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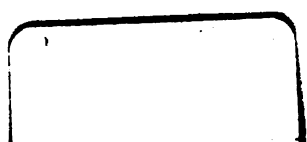
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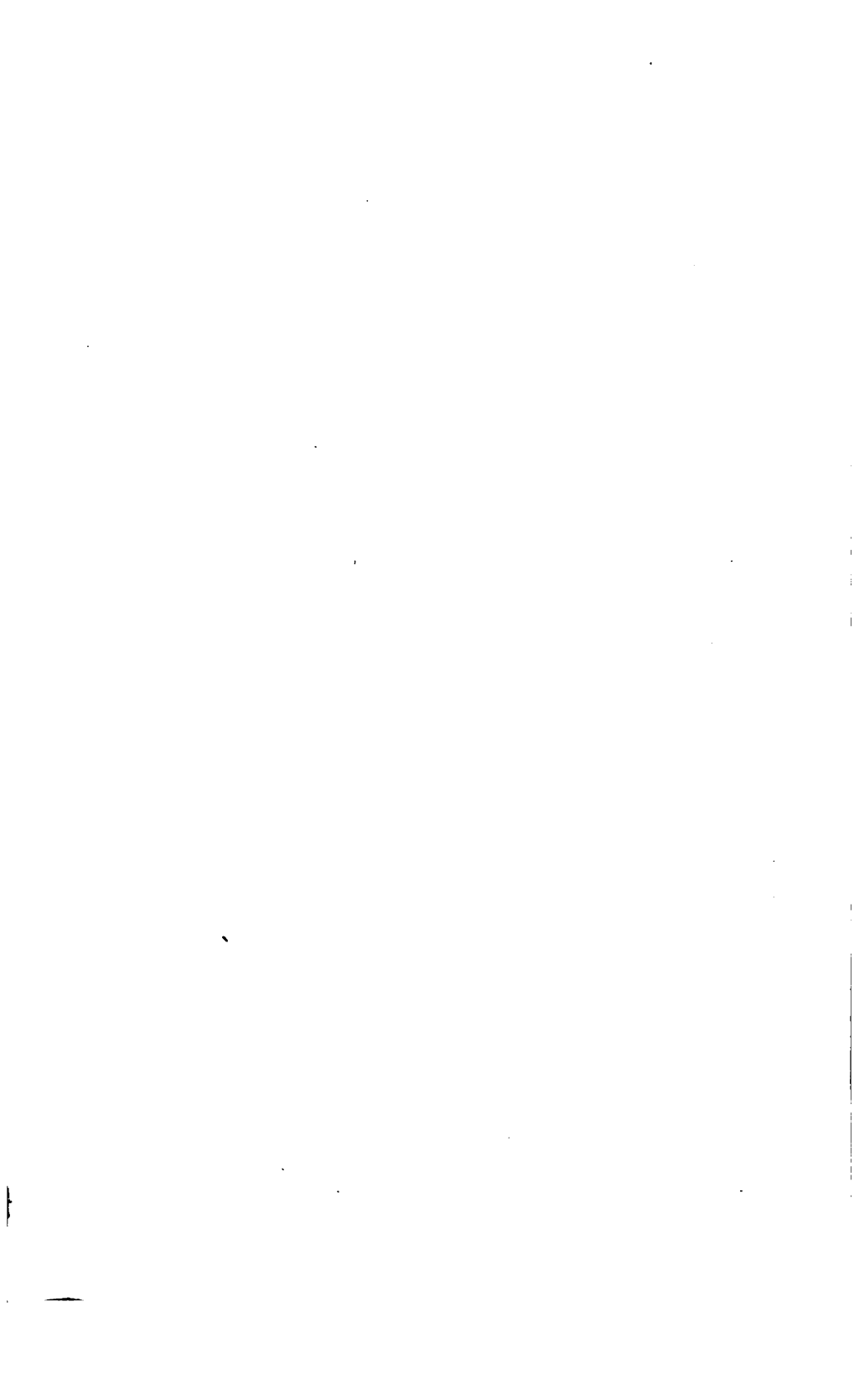


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**LAWRANCE'S
BENGAL LAW REPORTS**

BEING

**DECISIONS OF THE HIGH COURT AT
CALCUTTA,**

AND

**OF HER MAJESTY'S MOST HONORABLE
PRIVY COUNCIL.**

ON

INDIAN APPEALS.

VOL. XV.

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HIGH COURT:

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GASPER GREGORY, INNER TEMPLE.

C. P. HILL, INNER TEMPLE.

AMEER ALI, INNER TEMPLE.

C. H. REILY, MIDDLE TEMPLE.

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JUDGES OF THE HIGH COURT.

HON'BLE SIR RICHARD COUCH, *Knight, Chief Justice.*

„ SIR RICHARD GARTH, *Knight, Chief Justice.*

„ A. G. MACPHERSON, *Officiating Chief Justice.*

„ F. B. KEMP,

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„ W. F. McDONELL,

„ H. B. LAWFORD,

Puisne Judges.

MR. PAUL, *Officiating Advocate-General.*

„ KENNEDY, *Standing Counsel.*

„ PHILLIPS, *Officiating Standing Counsel.*

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BENGAL LAW REPORTS.

APPELLATE CIVIL.

Before Sir Richard Couch, Kt., Chief Justice, and Mr. Justice Ainslie.

MRINMOYEE DABEA (PLAINTIFF) v. BHOOBUNMOYEE DABEA
AND ANOTHER (DEFENDANTS).*

1874
Nov. 24, 25
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Dec. 7.

Suit to set aside adoption—Declaratory Decree—Limitation Act, XIV of 1859, s. 1, cl. 16—Act I of 1872 (Evidence Act)—Deposition in former Suit

H N died on 18th May 1854 without issue, leaving a widow *B. B.* on 19th May 1856, purported to adopt *S* in accordance with an alleged *anumati-patra* executed by *H N*. *R N*, the uncle of *H N*, died on 6th July 1855 leaving a widow *M*, in whose favor he had executed an *anumati-patra*, by the terms of which she was to have the management of his property during the minority of the adopted son, in whom it was to vest on his adoption. *M* adopted *D* subsequently to the adoption of *S*. After the death of *R N*, *B*, as widow of *H N*, and adoptive mother of *S*, brought a suit against *M* as the widow of *R N*, and ignoring the existence of *D*. *D* died, and on his death *M* adopted *N* on 4th April 1864. In a suit brought on 4th January 1873 by *M*, as the mother and guardian of *N*, to have the adoption of *S* declared invalid.—*Held*, that the limitation provided by cl. 16, s. 1, Act XIV of 1859 is applicable to a suit for a declaratory decree. The cause of action arose at the date of the adoption of *S*, *vis.*, the 19th May 1856, and therefore the suit was barred.

Held also, that the deposition of certain witnesses who had been examined in the previous suit to establish the fact of the adoption of *S* by *B*, were not under s. 33, Act I of 1872, admissible in evidence against the plaintiff *M* in the present suit.

THIS suit was brought on 4th January 1873 by Mrinmoyee Dabea, the widow of Romendro Narain Adhikari and the adopt-

* Regular Appeal, No. 275 of 1873, against a decree of the Subordinate Judge of Zilla Rajshahye, dated the 4th August 1873.

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ive mother and guardian of Nogendro Narain Adhikari, a minor, against Bhoobunmoyee Dabea, the widow of Horendro Narain Adhikari, and Chunder Kishore Gossami, described as being generally known by the name of Shibendro Narain Adhikari. The plaint prayed that the allegation of an adoption made by the defendant Bhoobunmoyee Dabea, of the defendant Shibendro Narain might be declared to be false, the reversionary right of Nogendro Narain being thereby injured.

The allegations upon which the suit was founded were that Horendro Narain Adhikari was the nephew of Romendro Narain Adhikari, the husband of the plaintiff Mrinmoyee Dabea ; that Horendro Narain died on the 16th May 1854 without having issue, and that the defendant Bhoobunmoyee had given out that she had adopted the second defendant as her son ; but the plaintiff alleged that Horendro Narain never gave any permission to adopt nor executed any deed, and also that the husband of Hurosoondery Dabea, the mother of the person adopted and who gave him in adoption, did not empower her to do so : that the plaintiff had, under a registered *anumati-patra* of her husband, who died on 6th July 1855, at first adopted one Debendro, and that on his death she adopted Nogendro on the 23rd Chaitra 1270 (4th April 1864). By this *anumati-patra*, the interest in Romendro's property vested in the adopted son from the time of the adoption, and Mrinmoyee was to have the management during the minority of the adopted son.

The defendant Bhoobunmoyee in her written statement submitted that the adoption of Nogendro Narain by the plaintiff was invalid ; that the plaintiff could not sue as mother and guardian of her adopted son without first obtaining a certificate under Act XL of 1853 ; that her husband Horendro Narain died on the 16th May 1854, leaving her an *anumati-patra*, dated the 14th of May 1854 ; that Shibendro was taken by Bhoobunmoyee to the family-house and treated as the person who was to be adopted by her, he having been named in the *anumati-patra*, but the adoption was not completed until the 19th of May 1856 ; that the suit was barred under the law of limitation, inasmuch as twelve years had elapsed from the 19th May 1856, which was the date of Shibendro Narain's adoption ; that the plaintiff

was aware of the adoption of Shibendro, which took place after the death of Romendro, who died on the 6th of July 1855, when plaintiff was in possession, and could sue to set aside the adoption. Among other documents, the defendant filed certain depositions of witnesses who had been examined in a previous suit she had brought shortly after the death of her husband against Mrinmoyee as the widow of Romendro to establish the fact of her having adopted Shibendro under an *anumati-patra* from her husband. But in that suit Mrinmoyee was sued in her own right as the widow of Romendro, and no notice was taken of Debendro as an adopted son.

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There was no evidence to show that the adoption of Debendro was made before July 1856.

The Subordinate Judge dismissed the suit, both on the ground of limitation and because he was of opinion that the defendant Shibendro had been lawfully adopted.

On the question of limitation, he held that the cause of action arose during the lifetime of the plaintiff's husband,—that is to say, in 1854, when Shibendro was brought into the family-house of Horendro for the purpose of being adopted, and that it was quite clear that plaintiff's husband knew that Bhoobunmoyee had an *anumati-patra* from her husband as it was mentioned in a *dan-patra* by her husband, which was registered. Besides, the fact of her having an *anumati-patra* was mentioned by Bhoobunmoyee in a suit which had been commenced by Romendro and Horendro jointly, and which she afterwards carried on jointly with Romendro after the death of her husband: and as Romendro would be the person entitled to take the property next after Bhoobunmoyee, and he took no steps to question the *anumati-patra*, nobody claiming through him could bring a suit eighteen years after the publication of the *anumati-patra* on the ground of any legal disability. He, therefore, held that the suit was barred under s. 11 of Act XIV of 1859.

From this decision the plaintiff now appealed to the High Court.

Mr. Woodroffe (with him Baboos Srinath Doss, Mohini Mohun Roy, and Kishori Mohun Roy) for the appellant.

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Mr. Lowe (with him Baboos Romesh Chunder Mitter and Doorga Mohun Doss) for the respondents.

Mr. Woodroffe.—Nogendro was not adopted until after the death of Romendro, and on his being adopted, the succession opened to him. He would only be entitled on the death of the widow Mrinmoyee; so the cause of action as far as he is concerned would not arise until the death of Mrinmoyee, *Srinath Gangopadhyaya v. Mahes Chandra Roy* (1); and he could bring his suit on attaining majority, and even three years after. It cannot be said then that a suit brought by his guardian during his minority was barred. This is only a declaratory suit, and under the circumstances under which it is brought the Limitation Act does not affect it. There is no provision in Act XIV of 1859 for such a case. Shibendro's adoption alone is not a sufficient cause of action. Shibendro could only take after Romendro's widow, and such sons as she might adopt. She might be obliged to adopt a succession of sons, and the last one might be adopted ten or twenty years after her husband's death: if Shibendro's adoption be the cause of action, the son adopted by Romendro's widow might never have a chance of claiming the property, his suit having been barred before he became a son. In suits to set aside adoptions, the period does not always run from the date of adoption—*Sooburnemonee Dabee v. Petumber Dobe* (2).

Mr. Lowe, for the respondents, sought to show that Mrinmoyee was aware of Shibendro's adoption, by referring to the evidence given in the suit brought by Bhoobunmoyee, as widow of Hurendro and adoptive mother of Shibendro, against Mrinmoyee as widow of Romendro.

Mr. Woodroffe objected that such evidence was inadmissible as Mrinmoyee was then sued in her own right as widow, and not as the guardian of Nogendro, who is the real plaintiff in this case; besides, Mrinmoyee had not even the right of a widow, as her interest was cut down by the *anumati-patra* by her husband.

(1) 4 B. L. R., F. B., 3.

(2) 1 Marsh., 221.

On this point, the following preliminary judgment of the Court was delivered by

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COUCH, C.J.—I think the deposition ought not to be received. The 33rd section of the Evidence Act provides that, in order to make a deposition admissible, the proceeding in which the evidence has been given by the witness must be between the same parties or their representatives in interest. The present suit is in reality a suit by Nogendro Narain by Mrinmoyee, his mother and guardain. The right to have a declaration of the invalidity of the adoption of Chunder Kishore is a right which is in Nogendro as the expectant successor upon the death of the widow Bhoobunmoyee to the portion of the property that belonged to Horendro. The suit in which the evidence was given was brought by Bhoobunmoyee as the widow of Horendro and adoptive mother of the minor Shibendro against Mrinmoyee describing her as the widow of Romendro Narain, and taking no notice of the fact that at that time there was in existence an adopted son of Romendro, namely, Debendro Narain. When we look at the terms of the *anumati-patra* executed by Romendro, we find that the interest in the property vested upon the adoption in the adopted son, and that what Mrinmoyee had under that deed was only a power of managing the property and continuing in possession of it during the minority of the adopted son. The estate was in the person who had been adopted; and Bhoobunmoyee on that occasion thought fit to sue a person who had not a widow's interest in the property and was not in a position to represent the estate in the manner in which a Hindu widow has been held to do. Therefore, it appears to me, that it cannot be said that the plaintiff in the present suit, the infant who has been adopted by her after the death of Debendro, is a representative in interest of Mrinmoyee the party to the former suit.

It is not necessary for us to say what would be the case if at the time of the first suit there had been no adopted son in existence, and Mrinmoyee at that time had had a widow's estate in the property; or if, instead of the suit being brought, as it was, against Mrinmoyee in her own right, it had been brought

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against her as the mother and guardian of Debendro, the then adopted son. I will only say that when such a question as that arises, as it probably will some day, the rule of the English law of evidence by which where there were several remainders limited by one deed, a judgment for or against one of them would be evidence for or against the next in succession, may be considered; because he does not claim under the first remainderman but under the deed which is the title of both. This is probably the nearest analogous case in the English law to that of sons successively adopted, or of a suit brought against a widow before any adoption, and an adoption being made afterwards. At present we need only decide that from the manner in which Mrinmoyee was sued in the first suit, it cannot be said that the present suit is between the representatives in interest of the parties in the former suit, for that reason I think that the deposition cannot be received.

Mr. *Lowe*, on the question of limitation, then contended that time began to run from the 19th of May 1856, when the adoption was completed. Cl. 16, s. 1 of Act XIV of 1859, applies to a case like this. The words are general enough to include it, and the section is expressly intended for cases for which no other provision is made by the Act. *Sooburnomonee Dabea v. Petumber Dobey* (1) has no application, as it has not been shown that the plaintiff was ignorant of the adoption.

Mr. *Woodroffe* in reply.

Upon the whole case, the judgment of the Court was delivered by

COUCH, C. J. (who, after shortly stating the facts, continued):—The first question to be determined is whether the suit is barred by the law of limitation.

The Subordinate Judge who has decided against the plaintiff and dismissed the suit has in a manner decided this question, but he also gave his decision upon the other question, namely,

(1) 1 Marsh., 221.

whether the second defendant, Shibendro Narain, was lawfully adopted.

Herendro Narain died on the 16th of May 1854, and the alleged permission to adopt, the *anumati-patra*, is dated the 14th of May 1854. According to the evidence, Shibendro Narain was taken by Bhoobunmoyee to the family-house and treated as the person who was to be adopted by her, having been named in the *anumati-patra*, but the adoption was not completed until the 19th of May 1856.

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If this case is governed by the law of limitation, it is by Act XIV of 1859. The words of cl. 16 of s. 1 of that Act are so general, that I can see no ground for saying that a declaratory suit such as this is, namely, to declare that there is no valid adoption does not come within it. They are:—"To all suits for which no other limitation is hereby expressly provided, the period of six years from the time the cause of action arose." The intention of the Legislature seems to be to provide a limitation for every suit. Having stated certain periods for different suits by the previous clauses and the last clause of the first section says that to all suits for which no other limitation is provided, the period is to be six years from the time when the cause of action arose. There are several cases in this Court in which it appears to have been considered that the law of limitation would apply to a declaratory suit, but I am not aware of any case in which it has been expressly decided. In many cases it would be unnecessary to decide it, as the Court, in the exercise of the discretion which it has, would decline to make a declaratory decree even if a lesser time had elapsed before bringing the suit, unless there were special circumstances.

I think, therefore, that the 16th clause does apply to a suit of this description, and then the only exception to the time beginning to run from the date of the adoption, which is the cause of action in a suit to have it declared invalid, is that which is provided in s. 9, namely, the right of action being concealed by means of fraud. Here, there is no evidence that the adoption which was made by Bhoobunmoyee after the death of Romendro, who died on the 6th of July 1855, was in any

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way concealed from Mrinmoyee. The cause of action therefore arose then, and the period of limitation would then begin to run. There is no evidence that Mrinmoyee had before that made any adoption under the power which it is admitted she had from Romendro. The plaintiff Nogendro is a secondly adopted son. There was a previously adopted son who died namely, Debendro ; but in the absence of any evidence of the time when his adoption was made, we cannot assume an affirmative in favor of the plaintiff, namely, that it was made before July 1856. So far as there is any evidence, it appears that it had not been made at that time. Therefore, on the 19th of May 1856, when the cause of action arose, Mrinmoyee was entitled to and in possession of the property of Romendro. Whether she was the person who, if Bhoobunmoyee died without making any valid adoption, would succeed to the share of Horendro need not be determined. There was no minor in existence who had the right so as to make the provision in the law of limitation in favor of minors applicable. Whether the right to bring such a suit as this, upon the adoption being set up by Bhoobunmoyee, was in her, or in some other person is not material. It is sufficient that it does not appear that the right was in a minor.

Therefore it appears to me that in this case the cause of action upon which the present suit is founded, it being merely a suit to declare the adoption invalid, arose on the 19th of May 1856. And this suit was brought much beyond six years and even beyond twelve years, if that period could be made applicable. I therefore think it is barred by the law of limitation. But, as the Subordinate Judge also decided the question whether a valid adoption was proved by the defendants, it is desirable that we should give our decision upon it.

The plaintiff impeaches the adoption upon two grounds : first, that Horendro Narain gave no permission to his wife to adopt a son ; and, secondly, that the father of the boy who was adopted did not give to his wife Hurosoondery permission to give the boy in adoption.

[His Lordship then went through the evidence and found these two grounds in favor of the defendants and concided] :—

Upon both grounds, first, that the suit for a declaration of the invalidity of the adoption is barred by the law of limitation ; and, secondly, upon the facts I think that the decision of the Court below is right, and that the appeal ought to be dismissed with costs.

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Appeal dismissed (1).

(1) *Before Mr. Justice L. S. Jackson
and Mr Justice McDonell.*

SIDDHESUR DUTT AND ANOTHER
(PLAINTIFFS) v. SHAM CHAND NUN-
DUN AND OTHERS (DEFENDANTS).*

The 22nd February 1875.

*Suit to set aside Adoption—Limita-
tion—Act IX of 1871, Sched. ii,
No. 129, s. 7—Cause of Action—
Minority.*

In a suit by the reversionary heirs of one S to set aside an adoption alleged to have been made with the permission of S, the plaintiffs alleged that S died in 1844 ; that the adoption took place in 1845 ; and that they attained their majority respectively on the 26th September 1871 and the 20th December 1872.

The suit was instituted on 16th June 1873. Held, that the adoption having taken place after the death of S, the cause of action arose at the date of the adoption, as provided by No. 129, Sched. ii ; Act IX of 1871 : and that the plaintiffs not having been in existence when the cause of action arose, were not entitled to the benefit of s. 7, Act IX of 1871, so as to enable them to sue within three years of attaining their majority.

SUIT to set aside an adoption. The plaintiff alleged that one Saya Ram Nundun, the plaintiff's maternal grandfather who was possessed of considerable property, moveable and immovable, died on 30th Kartik 1251 (14th November 1844) leaving two daughters, Juggodissury Dasi, the mother of the plaintiffs, and their minor brother Bakhul Das Dutt, and Bhoobnessuri

Dasi, and his second wife Tripoora Soondery Dasi him surviving ; that on his death the plaintiffs then being minors, the first two defendants Sham Chand and Prem Chand, in collusion with Tripoora Soondery and with the plaintiff's father Kristo Ohunder Dutt, set up the third defendant Doorga Das Nundun, the eldest son of Sham Chand as the adopted son of Saya Ram ; that Saya Ram neither adopted any son himself, nor gave permission for such adoption ; that the plaintiffs were the legal heirs and successors of Saya Ram, and brought the present suit to protect their reversionary right by setting aside the adoption of Doorga Das Dutt. The plaintiffs alleged that they attained their majority respectively on 11th Aswin 1278 (26th September 1871) and 7th Pous 1279 (20th December 1872).

The alleged adoption was stated to have been made on 25th Sraban 1252 (8th August 1845).

The suit was instituted on 16th June 1873. The defendants in their written statements raised (*inter alia*) the defence that the suit was barred by the law of limitation, and this was the only defence material to this report.

The Subordinate Judge was of opinion that as No. 129 of Sched. ii of Act IX of 1871, provided that a suit for setting aside an adoption might be instituted within twelve years from

* Regular Appeal, No. 32 of 1874, against a decree of the Officiating Subordinate Judge of Zilla Hooghly, dated the 15th January 1874.

PRIVY COUNCIL.

P. C.*

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• AMRITOLAL BOSE AND OTHERS (DEFENDANTS) v. RAJONEEKANT MITTER AND ANOTHER (PLAINTIFFS).

[On appeal from the High Court of Judicature at Fort William in Bengal.]

Limitation—Hindu Law—Inheritance—Succession of Widows and Daughters—Reversioners—Evidence—Admission on Pleadings.

Where a Hindu widow, who takes by inheritance from her husband, is dispossessed, the period of limitation as against the reversionary heir claiming

the death of the person making the adoption, and as Tripoora Soondery, the adoptive mother was alive, the suit was not barred by limitation. He referred to the case of *Srinath Gengopadhya v. Mahes Chandra Roy* (a). On the merits he found that the adoption of Doorga Das was a valid adoption, and dismissed the suit.

The plaintiffs appealed to the High Court.

Baboo *Umbica Churn Bosa* and *Jogesh Chunder Dey* for the appellants.

Baboo *Mohini Mohun Roy* and *Bipro Dass Mookerjee* for the respondents.

The judgment of the Court was delivered by

JACKSON, J.—This is a suit brought by Sidhessur Dutt and Behary Lall Dutt against several persons, to set aside a false and fraudulent allegation of adoption, the person whose adoption is impugned being the third-named defendant Doorga Das Nundun. This Doorga Das appears to have been

adopted by Tripoora Soondery, the second wife of one Saya Ram Nundan, so long ago as the Bengali year 1252 (1845), in accordance with an alleged permission of Saya Ram, who himself died in 1251 (1844). The adoption, therefore, had taken place about twenty-eight years before the commencement of the present suit. The plaintiffs alleged in their plaint, that they have come of age respectively on the 11th Aswin 1278 (26th September 1871) and the 7th Pous 1279 (20th December 1873), and that the suit having been commenced within three years after the date of their attaining majority, it is in time. The defendants objected, amongst other things, that the suit was barred by limitation. Upon this issue, the Subordinate Judge made this observation:—"It is to be observed the defendants object that the plaintiff's claim is barred by limitation, but No. 129 of Sched. II of Act IX of 1871 provides that a suit for setting aside an adoption may be instituted within twelve years from the death of the person making the adoption. Hence, as Tripoora Soondery, the adoptive mother of the defendant

(a) 4 B. L. R., F. B., 3.

* *Present*.—SIR J. W. COLVILLE, SIR B. PEACOCK, AND SIR R. P. COLLIER.

the succession after the widow's death is, in the absence of fraud, to be reckoned, not from the time of the widow's death, but from the time from which it would have run against the widow had she lived and sued to recover the inheritance—*Nobin Chunder Chuckerbutty v. Gurn Persad Doss* (1) approved.

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In the English Common Law Courts, and, *a fortiori*, in the Courts of Law

No. 3 is alive, the plaintiff's claim cannot be barred by limitation," then he refers to a case of *Srinath Gangopadhyay v. Mahes Chandra Roy* (a), in which a Full Bench of the High Court determined that the cause of action in a suit for setting aside an adoption accrues after the death of the widow making the adoption. It is to be observed that the expression "person making the adoption" is an incorrect paraphrase of the words of the Act. No. 129 of the 2nd Schedule prescribes the time when the period begins to run, viz., "the date of the adoption or (at the option of the plaintiff) the date of the death of the adoptive father." Now this does not appear to be one of those cases in which the word "father" might be construed to include mother, and the term "adoptive" father therefore must be construed strictly. But in this case, the father died before the adoption had taken place. The period, therefore, must begin to run from the date of the adoption. The Subordinate Judge, after disposing in that way of the plea of limitation, went on first upon an objection taken under s. 2 of the Code of Civil Procedure and then upon the merits. He decided against the plaintiffs upon the merits, and the plaintiffs have appealed. But the respondents having taken an objection under s. 348 against the decision on limitation we have dealt with that first. The plaintiffs seek to escape from the operation of Act IX of 1871 by alleging minority which they say terminated within three years before the commencement of the suit. In order to be able to claim that benefit, they must bring themselves within the terms of s. 7 of that Act which are these:—"If a person entitled to sue be, at the time the right to sue accrues, a minor, or insane, or an idiot, he may institute the suit within the same period after the disability has ceased as would otherwise have been allowed from the time prescribed." Now these two plaintiffs were not minors and were not in existence at the time the right to sue accrued, because in this instance the right to sue accrued at the date of the adoption. There was no minor amongst the plaintiffs who was entitled to sue at the time when the adoption took place and therefore they were not at liberty to avail themselves at the subsequent time of the benefit of the provisions of s. 7. There were other persons who at that time would be heirs of the deceased. Saya Ram, and the right to sue which accrued to them could not be kept indefinitely postponed till the birth of the plaintiffs. This seems also to be the view taken in the case of *Mrinmoyee Dabee* (b), and the point appears so clear that it is unnecessary to go into the other points raised in appeal. We dismiss the appeal with costs.

(a) 4 B. L. R., F. B., 3.

(1) B. L. R., Sup. Vol., 1008.

(b) *Ante*, p. 1.

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in India, where the pleadings are less technical, an admission of a fact on the pleadings by implication, is not an admission for any other purpose than that of the particular issue, and is not tantamount to proof of the fact.

An admission, or even a confession of judgment by one of several defendants in a suit, is no evidence against another defendant.

In a suit instituted before Act XIV of 1852 came into operation, the periods of successive minorities might be deducted in reckoning the term of limitation.

R, holding ancestral estates in Bengal, jointly with his brothers as an undivided Hindu family, died, leaving a widow, S, and three unmarried daughters, B, S M, and N. On her husband's death, S continued to reside with his brothers, and was supported out of the income of the joint estate. During the lifetime of S, her daughters married, and B became a widow without having had a child. After S's death, and during the lifetime of S M, N also became a childless widow. S M died after her mother, leaving a son R K. R K, on attaining majority, sued to recover with mesne profits a 4-anna share in the ancestral estates to which he claimed to be entitled on his mother's death as heir of B, and from which he alleged that he had been dispossessed by the representative of R's brothers, whom he made defendants in the suit, joining B and N with them as co-defendants. Some time after the institution of the suit, a petition was filed, purporting to proceed from B and N, by which they admitted that the plaintiff was the heir of R, and that they had no defence to offer.—*Held, 1st.*—That limitation could not be taken to have run against the plaintiff's claim during the lifetime of S, who, in the absence of proof that she had received only maintenance, as distinguished from participation in the profits of the estate, must be presumed to have had possession of the share in the estate which she inherited as her husband's widow. *2nd.*—That B being a childless widow at the time of her mother's death, could take no interest in her father's estate. *3rd.*—That, on their mother's death, S M and N as heirs of their father took a joint estate in his succession; and on S M's death, the estate which had come to her and N jointly, survived to N, since the fact of the latter being at the time a childless widow, did not destroy the right of survivorship which she had previously acquired by inheritance. *4th.*—That N being the heir of R, R K had not, during her lifetime, any right to any part of the estate, and that his position was not altered by the petition, purporting to proceed from B and N, such petition not amounting to a conveyance or disclaimer of title in his favor. *5th.*—That, if the petition could have been treated as a relinquishment on the part of N of her rights in the plaintiffs favor, it would have been necessary to enquire whether N was not herself barred by limitation at the time when she transferred her rights.

APPEAL from a decision of a Division Bench (Trevor and L. S. Jackson, JJ.) of the Calcutta High Court, dated the 31st

December 1862, reversing a judgment and decree of the Judge of Jessore, dated the 21st December 1859.

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The suit was brought by Rajoneekant Mitter and Womeschunder Roy, the former of whom sued as the only son of a daughter of Ramnarsing Bose, deceased, to recover a 4-anna share in certain ancestral estates, and of other properties purchased with the income of the said estates, while the latter claimed as purchaser from Rajoneekant of a moiety of the said share.

The ancestral estates in question had descended to four brothers, Ramtonoo, Ramnursing, Ramdoyal, and Debnarain Bose, from their father Gokoolchunder Bose, and were held by the four brothers as an undivided Hindu family. Ramnursing died in the year 1824, leaving his widow, Soorjomonee, and three daughters, Bindobassinee, Sarodamoyee, and Nittokally, but no son, him surviving. All the three daughters married during the lifetime of their mother Soorjomonee, and all three survived her. During Soorjomonee's life time Bindobassinee became a widow without having had a child. After the death of Soorjomonee in 1836, but during the lifetime of her sister Sarodamoyee, Nittokally also became a widow without having had children. Sarodamoyee died in 1845, leaving a son, the plaintiff Rajoneekant, who was born in 1839.

The plaintiff Rajoneekant alleged that, on Ramnursing's death, Soorjomonee and her daughters continued to live with Ramnursing's brothers in the family residence and in common enjoyment of the family property; that on Bindobassinee and Nittokally becoming childless widows, the right of succession to Ramnursing's share in the ancestral estates devolved by Hindu law on his mother Sarodamoyee; that after her death, and on his attaining majority, he had asserted his right to realize separately the collection of the 4-anna share which Ramnursing had in the joint estate, when he was resisted by the representatives of his maternal grand-uncles, Ramtonoo and Ramdoyal (his maternal grand-uncle Debnarain having died without issue), and was ousted by them in the year 1857. The plaintiffs' suit was instituted on the 9th September 1858.

The principal defendants, in answer to the plaintiffs' claim,

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alleged that Ramnursing, being without male issue, had shortly, before his death, conveyed his interest in the joint estates to his brothers by a deed of gift under which they had held exclusive possession of the entire estates from the time of Ramnursing's death, and that the plaintiffs' claim was consequently out of time.

About six months after the institution of the suit, a petition was filed in the Jessore Court, purporting to proceed from Bindobassinee and Nittokally, whom the plaintiffs had joined as co-defendants, in which they stated that they had no objection to the claim, since Rajoneekant was the real heir of their father Ramnursing.

The claim was dismissed by the Zilla Judge, who held it not proved that Rajoneekant, his mother, or his grandmother had ever been in possession of the property in dispute, and consequently considered the suit to be barred by limitation. With reference to the petition purporting to proceed from Bindobassinee and Nittokally, he observed:—"We cannot be certain who filed the petition, and women in this country may be easily induced to lend their names to anything," and he accordingly attached no weight to it.

On regular appeal to the High Court, this decision was reversed, the Judge being of opinion that there was evidence to show that the parties had lived together as members of an undivided Hindu family, the plaintiff's immediate predecessors being females; and that, in such circumstances, there could be no such adverse possession as would support the plea of limitation. The High Court were further of opinion that effect was to be given to the petition, purporting to have been filed by Bindobassinee and Nittokally, it being competent for Hindu women in their position to convey their estate to the next heir. With respect to the alleged deed of gift, the Judges considered that there was no sufficient evidence to support it, and holding Rajoneekant's right of inheritance to be clearly established, they gave a decree in favor of the plaintiffs to the entire extent of their claim (1).

From this decision the defedants now appealed to Her Majesty in Council.

(1) Marsh., 241; S. C., 1 Hay, 518.

Mr. *Doyns* for the appellants.—The plaintiff *Rajoneekant* cannot claim as heir to his maternal grandfather during the lifetime of his maternal aunts, *Bindobassinee* and *Nittokally*, or at any rate during the lifetime of the latter. Where the right of succession has once vested in a daughter, it is not afterwards lost, though she should be barren; and the survivor of two daughters who have inherited their father's estate succeeds to her sister's share; see the *Vyavastha Darpana* (2nd ed.) pp. 170, 171, and pp. 12 and 13 of the preliminary remarks; and pp. 21 and 22 of *Macnaghten's Hindu Law*. On these authorities it is clear that, on *Soorjomonee's* death, *Nittokally* succeeded jointly with *Sarodamoyee* to *Ramnursing's* estate, and on *Sarodamoyee's* death took the whole estate. While she lived, *Rajoneekant* had no right of suit.

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As to the issue of limitation, the plaintiffs were out of time. Neither *Rajoneekant*, nor his mother, nor his grandmother had ever had possession. The two latter had at most received maintenance. The appellants showed an uninterrupted adverse enjoyment of the property in dispute for more than twelve years prior to suit; and had thereby, under Regulations III of 1793, and II of 1805, acquired a title which could not be displaced—*Doe d. Sibckunder Doss v. Sibkissen Banerjee* (1).

The High Court was wrong in holding the deed of gift from *Ramnursing* not to be proved.

Mr. *Leith*, Q.C. (Mr. C. W. *Arathoon* with him) for the respondents.—The appellants failed in establishing the *hiba* on which they relied. The original should have been produced or its absence satisfactorily accounted for. As to *Rajoneekant's* right to succeed, see the judgment of *Mitter, J.*, in *Guru Gobind Shaha Mandal v. Anand Lal Ghose Masumdar* (2). Assuming that *Bindobassinee* and *Nittokally* were entitled to succeed *Ramnursing* as his heirs by Hindu law, it was competent for them to relinquish their rights in favor of *Rajoneekant*, who is the reversionary heir—*Protap Chunder Roy*

(1) 1 Boul. 70.

(2) 5 B. L. R. 15.

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 This they have done by their petition.
 There is no passage in the Hindu law which can be relied on
 as expressly deciding the position of several daughters taking as
 heirs to their father. The case of the succession of several
 widows is peculiar. The widows are looked on as making up
 one person. It does not follow that the same rule is to be
 applied to daughters.

Mr. *Doyle* in reply.—The petition on which the respondents
 rely is not itself on the record, but merely an abstract of it
 made by the sheristadar, a subordinate officer of the Court. It
 was simply handed in by a pleader, and there is no evidence of
 his authority. There is no difference between the case of two
 widows inheriting, and the case of two daughters inheriting.
 The estate of two widows taking their husband's property by
 inheritance is one estate. The one cannot alienate without the
 consent of the other, and the survivor takes the whole—*Bhug-*
wandeen Doobey v. Myna Bae(2).

Cur. adv. vult

Their LORDSHIPS' judgment was delivered by

Sir B. PEACOCK.—The respondents were plaintiffs and
 the appellants defendants in the Court below. The plaintiff
Rajoneekant Mitter, as the only son of a daughter of *Ram-*
nursing Bose, deceased, sued to recover a 4-anna share of
 certain ancestral estates, and of certain other properties pur-
 chased with the income of the said estates. The plaintiff
Womeschunder Roy claimed as a purchaser of a portion of the
 said share from the plaintiff *Rajoneekant*. His title depends
 upon that of *Rajoneekant*.

The ancestral estates originally descended to *Ramnursing*
 and his three brothers from their father, *Gokoolchunder Bose*,
 and were held by them as an undivided Hindu family. *Ram-*
nursing Bose died in November 1824, without a son, leaving a
 widow, *Soorjomonee*, and three daughters, *Bindobassinee*,
Sarodamoye, and *Nittokally*. *Soorjomonee*, the widow, died in

(1) 1 W. R. 98.

(2) 11 Moore's I. A., 487.

March 1835, and, upon her death, the heirs of Ramnursing were Sarodamoyee and Nittokally, two of the daughters, who were then married and likely to have sons. It may be taken against the plaintiff, upon his own statement, that Bindobassinee could not take any interest in her father's estate, as she was a childless widow at the time of her mother's death. In his plaint he says :—

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“ My elder aunt, Bindobassinee, having become a childless widow, my grandmother supported her and the other two daughters who were both under age, and effected the marriages of the two unmarried daughters in due and proper time. On the 30th of Baisak 1242 (12th May 1835,) my maternal grandmother breathed her last, leaving behind her my mother and my two maternal younger aunts ” (meaning his mother and his maternal younger aunt Nittokally), “ who were under age, and my maternal aunt Bindobassinee, under the maintenance and control of my maternal great-uncles.”

He then states his own title and eviction as follows :—

“ My mother attained her majority in the month of Chaitra 1243 (March-April 1837), and as my youngest maternal aunt unfortunately became a childless widow in the year 1244 (1837-38), so the right of succession to all the aforesaid properties accrued to my mother according to the shasters. I was born in the year 1246 (1839-40); but owing to my evil fortune I was at my tender age bereaved of my mother, who breathed her last on the 25th Kartik 1252 (9th November 1845). Since then I, together with my maternal aunts, remained under the guidance of Joy Doorga Dassee, mother of Prem (Jhand Bose and Amirtolal Bose, heirs of my maternal grand-uncle; and on their attaining majority, in the same house and in the same mess, and under the superintendence of the said persons, on the 16th Sraban 1262 (31st July 1855), I attained my majority. When I came to know what property I was entitled to as my grandfather's heir, I proposed separately to realise the collections of the one-fourth share of all the real and personal properties left by my maternal grandfather and grandmother, and mother, and of the real and personal properties, i. e., talooks, &c., acquired in own name or benami from the joint funds. Premchand Bose, Amirtolal Bose, and Joy Doorga Dassee, the principal defendants, having been instigated by the ill advice of wicked persons, and supported by the defendant Gooroodoss Roy, with the motive of divesting me of my rights, forcibly expelled me from the joint dwelling-house on the 16th Kartik 1264 (30th July 1857), and having ousted me by

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artifice, forcibly and fraudulently held possession of all the properties, and are enjoying the profits arising from the estate."

The principal defendants, in answer to the plaintiff's claim, stated that Ramnursing Bose, having no male issue, and having no probability of male issue, executed, in the year 1231 (1824-25) a hibanama, or deed of gift to his three brothers, and breathed his last. They then proceed:—

"The aforesaid three donees, by virtue of the said deed of gift, applied to the Courts to be made representatives in the cases that were then pending in the Court in the place of the said Ramnursing Bose. An istabarnama (proclamation) was duly issued from the Adawlut for the appearance of any heir within the period of six weeks. As the maternal grandmother of the Mitter plaintiff was acquainted with the truth and validity of the said deed of gift, no objections on that head were urged by her. The hibanama was produced in the Court by our predecessors, and testified to by them; and the Judge, considering the said deed to be genuine and proved, ordered, on the 22nd November 1825, the said Ramtonoo and Ramdoyal to be made representatives in the place of the aforesaid Ramnursing Bose. The said representatives agreeably to which conducted the suits in the Zilla and Sudder Courts, and having retained possession of all the properties specified in the hibanama, from the date of the said hibanama, managed the affairs, conducted several suits before the tribunal of different Courts and even in appeal to the Privy Council."

Three issues were laid down for trial, viz. :—

"1. Whether the plaintiff, Rajoneekant, as heir to a part of the paternal and self-acquired properties of Ramnursing Bose, his grandfather (the father of his mother), was in possession or not; and whether, on the 16th Kartik 1264, B.S. (30th July 1857), the defendants dispossessed him by turning him out of doors; and Rajoneekant ought to recover possession with meane profits or not?"

"2. Whether, according to the bill of sale given by Rajoneekant, both the plaintiffs can be entitled to possession of the property in dispute in equal proportions or not?"

"3. Whether, according to the deed of gift of Rajonee's maternal grandfather, the defendants have been holding possession; and whether such long and continuous possession bars the suit, and it should be dismissed or not?"

The plaint was filed on the 9th September 1858, before the Code of Civil Procedure (Act VIII of 1859), and before the

passing of the Limitation Act, XIV of 1859. The question of limitation must be determined according to the old law.

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The defendant's case is that limitation began to run from the time of Ramnursing's death. The Judge of Jessore held that there was no proof of possession by the plaintiff or by his mother or maternal grandmother.

It has been held by a Full Bench of the High Court at Calcutta, that in the case of succession by a reversionary heir after the death of a widow, who takes by inheritance from her husband, and is dispossessed, the period of limitation as against the reversionary heir, in the absence of fraud, is not to be reckoned from the time when he succeeds to the estate but from the time from which it would have been reckoned against the widow if she had lived and brought the suit--*Nobin Chunder Chuckerbutty v. Guru Persad Doss* (1). That rule has been acted upon in other cases, and it appears to their Lordships that the principle of that decision is correct. If in the present case limitation began to run against Soorjomonee, the widow of Ramnursing, the plaintiff's suit is barred.

The Judge of Jessore found that there was no proof of possession by Soorjomonee or by the plaintiff or his mother: and he held that a limitation was bar. Many of the plaintiffs' witnesses, however, deposed that Soorjomonee was in possession. The Judge of Jessore says:—

"What he" (referring to the plaintiff) "relies on, is the evidence of the witnesses named in the margin, who speak to his possession and ejectment. The evidence of these persons is to the effect that after the death of Ramnursing, his widow and daughters, and latterly his daughter's son, were in joint possession with the defendants; that about two years ago the plaintiff, finding that when in joint possession, he was burdened with an unfair share of the expenses, asked for a division of the shares, whereupon the defendants told him that he had no right to anything, abused him, and turned him out of the house. Most of these witnesses are well acquainted with the Bose family and their history. They live near or on the same spot. Some are to all appearance very respectable; nearly all give a connected, and some a full, account of the plaintiff's conditional prospects and treatment."

(1) B. L. R., Sup. Vol., 1008.

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The evidence of the witnesses above referred to is very loose and unsatisfactory; still their Lordships are induced by it to believe that Ramnursing's widow, Soorjomonee, continued to live with her deceased husband's brothers and was supported by them out of the income of the estate. Nothing could be more natural or consistent with the usage of Hindu families than that upon her husband's death she should continue to reside at the family dwelling-house as a member of the joint family. Indeed, the principal defendants state in their answer that "they retained their brother's wife, the said Soorjomonee, and unmarried daughter, under their own support and guidance, and they effected the marriage of the unmarried daughter into a suitable family, and in a proper manner." If the widow and her daughter continued to live as members of the joint family, the presumption would be that they were maintained out of the widow's share, which she inherited from her husband, unless it could be distinctly shown, which it has not been, that she received only maintenance as distinguished from a participation in the profits of the estate; for even if she did not receive her full share of the profits, limitation would not run against her in the same manner as if she had been actually dispossessed of her husband's share of the estate.

As regards her daughters Sarodamoyee and Nittokally, the case would be different. They were married during their mother's lifetime, and would naturally go to the residences of their respective husbands and become members of their respective families.

The evidence is not such as to induce their Lordships to believe that either Sarodamoyee or Nittokally, upon their mother's death, entered into joint possession of the estate with their father's brothers or their representatives, or that during the lives of their husbands they participated in the profits of the estate. Nittokally, after her husband's decease, may possibly have gone to live with her father's brothers, though, it is to be remarked, that in the description of her place of residence as a defendant in the suit she is stated to be of "Kattara, Pergunna Nuldee," which is different from that given of Bindobassinee. It is unnecessary, however, to

come to any conclusion in that respect as regards her. Sarodamoyee died before her husband, and there is no sufficient evidence to induce their Lordships to believe that after her marriage she continued with her father's brothers as a member of an undivided Hindu family.

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Their Lordships find that limitation began to run against the plaintiff's mother, Sarodamoyee, and that neither she nor the plaintiff ever had possession of any portion of his maternal grandmother's estate or of the rents or income thereof. But the period of limitation must be calculated according to the old law, and consequently the periods during which the plaintiff and his mother were respectively under the disability of minority must be deducted. Deducting those periods, there were only eight years seven months and twenty-four days during which the plaintiff's mother, and three years two months and nine days during which he himself, was not under disability, even calculating the period of the plaintiff's majority at the age of sixteen, and not eighteen. This would give only eleven years nine months and thirty-three days as the period to be taken against the plaintiff in calculating the time which had run against him at the time when his suit was commenced.

The High Court reversed the finding of the Zilla Judge upon the question of limitation, and stated that it had not been insisted upon before them. Their Lordships see no reason for interfering with that decision.

The question remains whether the plaintiff has made out his title; for he must recover (if at all) upon the strength of his own title, and not upon the weakness of that of his adversaries.

The title upon which he relied in his plaint was, that in consequence of his youngest maternal aunt's (i.e. Nittokally's) becoming a childless widow after the death of his grandmother and in the lifetime of his mother (Sarodamoyee), all the property accrued to his mother according to the shasters. But that was not so. The right to inherit vested in Nittokally jointly with Sarodamoyee, her sister, upon the death of their mother; for at that time she and her sister

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Sarodamoyee were two young married women, likely to have sons: and it is clear that, according to the Hindu law, the right once vested in a daughter by inheritance does not cease until her death, notwithstanding she become barren. or a widow who has not borne a son. Circumstances of that nature do not destroy a heritable right which has once vested.

This at once disposes of the claim of the plaintiff to take as heir to his grandfather any portion of the estate which vested in Nittokally, for she was living when the suit was commenced. It was contended, however, that the plaintiff, as the heir to his grandfather, succeeded upon the death of his mother to one moiety of the 4-anna share which descended to his mother and Nittokally, as Nittokally at the time of his mother's death was a childless widow. No proof was given that Nittokally became a childless widow during the lifetime of Sarodamoyee, but it was contended on behalf of the plaintiff that the fact was alleged in the plaint and admitted by the answer. The statement in the plaint is—

“That, as my youngest maternal aunt unfortunately became a childless widow in the year 1244 (that is, April 1837-38), so the right of succession to all the properties accrued to my mother according to the shasters.”

The answer is as follows :—

“From the statement in the plaint, that subsequent to the death of the maternal grandmother of the Mitter plaintiff, her three daughters lived some in a married state, some in a state of celibacy, and that all the properties left by his maternal grandfather devolved upon his mother, it is evident that this suit has been instituted merely from a malicious and vindictive motive. For agreeably to the Dharm Shasters and Dayabhaga, though any woman after obtaining paternal properties becomes a widow or sterile, yet nothing can bar her right to enjoy the said property during her lifetime; therefore the statement that subsequent to his maternal aunts becoming widows, the right and interest to all the properties devolved upon his mother is utterly false and fallacious.”

It appears to their Lordships that there is no admission in the answer tantamount to proof of the fact that Nittokally became a childless widow during the lifetime of the plaintiff's mother, Sarodamoyee. There is a denial that Sarodamoyee took the whole of her father's estate in consequence of Nittokally's

becoming a childless widow ; but no admission that, at the time of Sarodamoyee's death Nittokally was a childless widow, incapable of taking by descent from her father. There is merely an admission by implication in the denial of the legal effect imputed to the fact alleged ; and it has been repeatedly held that an admission of a fact on the pleadings by implication is not an admission for any other purpose than that of the particular issue, and is not tantamount to proof of the fact, *Edmunds v. Groves* (1), *Smith v. Martin* (2), and *Robins v. Maidstone* (3) : and it scarcely needs to be remarked that the effect given in our Common Law Courts to admissions on the pleadings has always been greater than that given to admissions in the less technical pleadings in the Courts in India.

Their Lordships, however, would hesitate before determining the case upon the ground that there was no proof that Nittokally became a childless widow in the lifetime of her sister Sarodamoyee ; for it was assumed throughout the argument before their Lordships that such was the case. They will, therefore, proceed to determine the question upon the assumption that Nittokally was a childless widow at the time of Sarodamoyee's death.

The question then resolves itself into this :—Had Sarodamoyee an interest in the estate distinct from that of Nittokally, which upon her death descended to the then heirs of her father ; or did she and her sister Nittokally take a joint estate by descent which, after Sarodamoyee's death, survived to her sister Nittokally ? If the former was the case, then Nittokally, having during the lifetime of Sarodamoyee, become disqualified as a childless widow to take by descent from her father, the plaintiff as the son of Sarodamoyee, was the next heir to her father, and, upon his mother's death would have taken as reversionary heir, to his grandfather the interest which had descended to his mother, and which, upon her death, would have descended to Nittokally as reversionary heir to her father, if she had not at that time been disqualified ; but if Sarodamoyee and her sister

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(1) 2 M. & W., 642.

(2) 9 M. & W., 304.

(3) 4 Q. B., 811, at p. 815.

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Nittokally, upon the death of their mother, together constituted their father's heir, then upon the death of Sarodamoyee the property which descended to the two sisters jointly survived to Nittokally, and her disqualification to inherit at that time did not destroy the right of survivorship which she had previously acquired by inheritance.

There is a great analogy between the case of widows and that of daughters taking by inheritance, though the pretension of daughters is inferior to that of widows (1). In the case of widows, it has been held by the Judicial Committee—see *Bhugwandeem Doobey v. Myna Baes* (2)—that the estate of two widows, who take their husband's property by inheritance, is one estate. "The right of survivorship," it is there said, "is so strong, that the survivor takes the whole property, to the exclusion, even, of daughters of the deceased widow." In the case of *Kattama Nachiar v. Dorasinga Tevar* (3), it was held that daughters, to whom as a class paternal property descends take a joint interest, with rights of survivorship. The former case had reference to property in Benares, and the latter to property in Southern India.

In the case of *Boidya Nath Sett v. Durga Churn Basak* (4), decided by the High Court of Bengal in its Original Jurisdiction on the 28th February 1865, it was held by Morgan, J., after consulting Shumbhoonath Pundit, J., a learned Hindu lawyer, that in a case where two daughters succeeded by inheritance to their father's estate, and one of them died leaving her sister who had then become a childless widow, the property survived to her sister; because, like widows, the two daughters collectively were in a legal sense one heir to their father (5). Their Lordships are of opinion that the last mentioned decision was correct, and that upon principle, as well as upon authority, the estates, upon the death of Sarodamoyee, survived to Nittokally though she would, at that time, have been incompetent to take by inheritance from her father.

(1) Dayabhaga, Ch. xi, s. 2, para. 30.
p. 193, quarto ed.

(2) 11 Moore's I. A., 487; see p. 515.

(3) 6 Mad H. C. Rep., 310.

(4) Not reported.

(5) See the Vyavastha Darpana,
by Shamachurn Sircar, 2nd. ed.
p. 170.

The High Court express no opinion upon that point; they seemed, however, to assume that the plaintiff acquired no right by inheritance during the lives of his aunts; but they decided in favor of the plaintiff, upon the strength of a petition said to have been presented to the Court by Bindobassinee and Nittokally, who were made defendants in the suit.

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In the index to the record, the petition is described as "the petition of Bindobassinee, filed on the 16th April 1859," which was more than six months after the filing of the plaint. The petition forms no part of the record transmitted to Her Majesty in Council; for in a note to the index it is stated that the paper cannot be traced. An abstract of the petition is set out in the decree of the Zilla Judge. It is as follows:—

"Abstract of the Petition of Bindobasinee Dasee and others."

"On the 16th April of the current year, that is, 1859, the said Dasee and Nittokally Dasee, two defendants, filed a petition, stating that they have no objection against the suit of the plaintiff; that their father Ramnursing Bose's rights continued in the plaintiff, Rajoneskant, as the real heir; that their father did not execute any hibanama; and that they agreed in the said suit of the plaintiffs, &c."

The Zilla Judge, speaking of this petition, says:—"I set no value on a petition said to have been filed by these women" (referring to Bindobassinee and Nittokally), "consenting to the plaintiff's suit. We cannot be certain who filed the petition, and women in this country may be easily induced to lend their names to anything."

With reference to this part of the case, the High Court says:—

"But another objection is taken to the suit, namely, that as plaintiff's maternal aunts, Bindobassinee and Nittokally, childless widows, are still living, and the plaintiff's right to succeed is contingent on his surviving them, his suit is at any rate premature.

"These two ladies have filed in the record of this case a petition, in which they acknowledge the plaintiff to be the rightful heir, disclaim any right of their own, and assent entirely to the suit. The Judge, gratuitously, as it seems to us, declares that he sets no value on this petition. He says:—'We cannot be certain who filed the petition, and women in this country may be easily induced to lend their names to anything.' We can find no reason for these observations. The petition

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appears to have been filed in the usual way, through a pleader duly authorized; it is not suggested that the woman had anywhere repudiated it, and we think it must be allowed the fullest legal effect of which it is capable.

"But we are asked, what is its effect? Females are not at liberty to do or assent to acts which may have the effect of changing the course of succession, and these two ladies, the respondents contend, cannot combine to give the inheritance in this case to a person who might eventually not be the legal heir. We consider this objection untenable; a Hindu widow, it has been ruled, is competent to alienate, with the consent of the next heirs, an estate of which she is in possession under a life-interest; she has also been permitted to convey the estate to the next heir himself. It is admitted that, by retiring from the world, or becoming byragis, they might immediately cause the succession to devolve on the plaintiff; and we think that when the plaintiff raises a particular question of title with the defendants, which clearly his aunts would be first entitled to raise, and he next after them, and where they expressly give up their right in his favor, and assent to his suit, the defendants cannot be permitted to object that plaintiff is debarred from suing until they are, by the course of nature, out of the way. We see, therefore, no difficulty in the way of a decision of this suit as at present constituted."

It appears to their Lordships that the Judges of the High Court have given a greater effect to this petition than that to which it is entitled.

Admitting, for the sake of argument, that the petition having been filed in the suit might, without proof of the execution of a vakalatnama by these ladies, or of any authority to file it, be used against the defendants, Bindobassinee and Nittokally, as an admission by them in the suit that the plaintiff was the real heir, and that they had no defence to the suit, it appears to their Lordships that that is the greatest effect that could be given to the document. The petition did not amount to a conveyance or to a disclaimer of title, but merely to an admission made more than six months after the commencement of the suit, that the plaintiff was the real heir and that they had no defence to offer. It is clear that an admission, or even a confession of judgment, by one of several defendants in a suit, is no evidence against another defendant. Suppose Nittokally, the real heir, had

been barred by limitation, she could not by her admission, contrary to the fact, that the plaintiff was the real heir, have bound the other defendants, and thus have entitled the plaintiff, upon a question of limitation, to a deduction of the period of his minority, to which she would not have been entitled herself.

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But there was, in fact, no evidence of any authority to file the petition. If a vakil professing to act for Nitokally had filed a deed purporting to have been executed by her before the commencement of the suit conveying the estate to the plaintiff, it would not have been evidence against the other defendants without further proof.

The decision of their Lordships upon the first issue having disposed of the present suit, it is perhaps unnecessary for them to express an opinion upon the third issue. They think it right, however, to add that they agree with the High Court in the conclusion at which they have arrived, viz., that, in the present suit, the defendants have wholly failed to establish the title upon which they rely as the foundation of their title.

Their Lordships are of opinion that the plaintiff had no right to inherit any portion of the estate during the life of Nittokally and that the petition did not vest any such right in him. His suit ought therefore to be dismissed, and dismissed against all the defendants, including Bindobassinee and Nittokally notwithstanding the petition. Such a petition confessing the suit cannot be admitted as warranting a judgment against them when upon an investigation it appears that the plaintiff was not the real heir; nor could it justify a decree against them for possession and mesne profits, when there was no allegation in the plaint, nor any evidence in the cause, that they had dispossessed him. The only charge of dispossession was against the principal defendants, Prem Chand Bose, Amirtolal, and Joy Doorga Dassee. Their Lordships will, therefore, humbly advise Her Majesty that the decision of the High Court be reversed, except so far as it reverses the judgment of the Zilla Judge, and that the suit be dismissed.

Considering that a great part of the costs has been incurred in consequence of the issues upon which the defendants have failed, and that it was necessary for the plaintiff to get rid of

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the decision of the Zilla Judge, their Lordships think it right to order that the parties respectively do bear their own costs in both the lower Courts and of this appeal.

The Judges of the High Court expressly declared by their decree that it was "to be known that from the death of Nittokally any dispute concerning the inheritance by other parties was not dermied by their decision." Their Lordships think it right to add, that they do not decide any question between Nittokally or Bindobassinee and the other defendants, but merely the questions raised in the suit as to the rights of the plaintiff at the time when the suit was instituted.

Appeal allowed.

Agents for the appellants : Messrs. *Bailey, Shaw, Smith, and Bailey.*

Agent for the respondents : *Mr. T. L. Wilson.*

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Sept. 15.

Before Mr. Justice L. S. Jackson and Mr. Justice McDonell.

**BHANOOMUTPY CHOWDHRAIN (PLAINTIFF) v PREMCHAND
NEOGEE AND ANOTHER (DEFENDANTS).***

Mortgage—Purchaser from Mortgagee—Notice of Foreclosure.

Property in the mofussil which had been mortgaged in 1862 to C by a deed in the English form containing the usual power of sale on default of payment, and again in 1864 to T by deed of conditional sale, was sold by C under the power of sale and purchased by N. Previously to the sale T had foreclosed. In a suit for possession of the property brought by the widow of T against N and the mortgagor, it appeared that no notice of foreclosure had been served on N.—*Held* that N was entitled to such notice by the fact of his purchase whether he had obtained possession or not, and that no notice having been served upon him, the suit was not maintainable against him.

THIS was a suit to recover possession of certain lands which originally belonged to one Shamdhone Rai Chowdhry, the husband of the first named defendant. In the year 1862

* Special Appeal, No. 1206 of 1874, against a decree of the Officiating Judge of Zilla 24-Pergunnas, dated the 14th April 1874, reversing a decree of the second Subordinate Judge of that district dated the 15th July 1873.

Shamdhone Rai mortgaged these lands to one Joseph Cones by a deed of mortgage in the English form, containing the usual power of sale on default of payment. In the exercise of this power, Cones, in the year 1865, caused the property to be sold by public auction, when a portion, named in this suit as plot No. 2, was purchased by the second defendant Neogee on the 18th of August of that year, but it did not appear when he obtained possession. Shamdhone Rai Chowdhry had, however, mortgaged the same lands in 1864 by a deed of conditional sale to one Tarasunker Rai Chowdhry, the husband of the plaintiff. Default having been made in the payment of the debt within the time stipulated, Tarasunker caused the usual notice of foreclosure to be served on the mortgagor on the 21st of September 1865, and the sale became absolute on the 22nd of September 1866.

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The first named defendant did not enter appearance. The second defendant set up in defence, among other grounds, (i) that no notice of foreclosure having been served on him, the suit was not maintainable as against him; (ii) that the plaintiff had no title as against him to the plot No. 2 of which he held possession by virtue of a purchase at a public sale held at the instance of Cones, the prior mortgagee. It appeared in evidence, that no notice had in fact been served on the second defendant.

The Court of first instance decreed the plaintiff's claim, holding that the defendant, who merely represented the first mortgagee, was not entitled to notice of foreclosure from the second mortgagee who applied for foreclosure, and that the plaintiff's suit ought not to fail simply because no notice of foreclosure was served on the defendant. It also held that the sale brought about by Cones, the first mortgagee, without the intervention of the Court, was null and void, and that the defendant, who purchased under it, acquired no title to the property.

The Judge, on appeal, dismissed the plaintiff's claim as against the second defendant, holding that the purchase by him was good and valid, and gave him a complete title to the property in dispute as purchaser at an auction-sale held by order of the prior mortgagee in exercise of the power reserved in the mortgage deed of 1862.

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The plaintiff appealed to the High Court.

BHANOOMUTTY
CHOWDHRAIN
v.
PREMCHAND
NEOGEE.

Baboo *Mohini Mohun Roy* and *Nollis Chunder Sen* for the
appellant.

Baboo *Annoda Persad Banerjee*, *Mohesh Chunder Chowdhry*,
and *Sreenath Does* for the respondents.

Baboo *Mohini Mohun Roy*, on behalf of the plaintiff, contended that the purchase by the second defendant at the sale held at the instance of a mortgagee who had not regularly foreclosed according to the law of the mofussil Courts, conveyed no valid title to him; the power which was reserved in this deed was repugnant to the principles of the Regulations enacted by the British Government for regulating the transfer of immoveable property in satisfaction of mortgage debts—*Bhuwanee Churn Mitr v. Jykishen Mitr* (1) and *Doucett v. Wise* (2).

Baboo *Annoda Persad Banerjee*, for the respondent, referred to *Sonatun Bysack v. Koonjo Behari Bysack* (3) as overruling *Bhuwanee Churn Mitr v. Jykishen Mitr* (1); and contended that the suit was not maintainable against the second defendant, inasmuch as no notice of foreclosure had been served on him—*Ganga Gobind Mandal v. Bani Madhab Ghose* (4) and *Mohun Lall Sookool v. Goluck Chunder Dutt* (5).

Baboo *Mohini Mohun Roy*, in reply, on the point of notice of foreclosure, urged that the defendant was not entitled to the benefit of the above rulings, unless he proved conclusively that he was a true and legal purchaser of the mortgagor's interest, which the defendant in this case was not, he having derived his title from the first mortgagee.

The judgment of the Court was delivered by

JACKSON, J.—The special appeal in this case raised a question of some difficulty and of great importance. We are asked

(1) S. D. A., 1347, 354.

(2) 2 L. J., N. S., 280.

(3) Unreported.

(4) 3 B. L. R., 172.

(5) 10 Moore's I. A., 1.

to decide whether upon a mortgage in the English form, relating to immoveable property, situated in the mofussil, and containing a power of sale, if the property were sold under that power and without reference to the Court, such sale could be supported as passing a valid title to the defendant. We were referred to the case of *Bhuwanee Churn Mitr v. Jykishen Mitr* (1) in which the Judges of the Sudder Court held that a person, relying upon such sale, could not eject a party holding under the Mortgagor. On the other hand, we were referred to the case of *Sonatur Bysack v. Koonjo Behari Bysack* (2), which was decided by a Division Bench of this Court in which a contrary view was affirmed, although the question there arose incidentally upon a question of costs. I confess that, if we were called upon to determine this point, we should have felt considerable difficulty; but, on calling upon the respondent's vakil, he laid before us an entirely different point upon which he submitted the plaintiff's suit ought to be dismissed. On that point we have heard the arguments of the special appellant, and the result is that in our opinion the objection thus referred to ought to prevail.

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It seems that the plaintiff relies upon a mortgage in the nature of a conditional-sale dated the 27th Bhadro 1271 (11th September 1864). That was a transaction between the owner of the property and one Tarasunker Rai Chowdhry, and it was stipulated that the amount advanced by him should be repaid on or before the 30th Sraban 1272 (13th August 1865). The payment was not made, and consequently it is said Tarasunker issued the notice of foreclosure on the 7th September 1865, and the notice was served on the owner Shamdhone Rai Chowdhry. The defendant's case was that some years before the date of the transaction, that is on the 10th of December 1862, Shamdhone Rai Chowdhry borrowed Rs. 1,000 from one Mr. Cones and had executed, the mortgage deed in the English form previously mentioned, and that under the power of sale contained in that deed, the property being sold by Messrs. Mackenzie, Lyall & Co., was purchased by the defendant on the 18th August 1865, that is to say, some nineteen or

(1) S. D. A., 1847, 354.

(2) Unreported.

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NEOSSE.

twenty days before the plaintiff applied for foreclosure. This question appears to have been considered by the Subordinate Judge who first tried the suit, but he was of opinion that the objection was not good. It was also raised before the District Judge on appeal, and the District Judge says :—" No authority has been offered in support of the contention, that appellant, as purchaser from the first mortgagee, is entitled to notice of foreclosure from the second mortgagee. Possibly, looking at appellant as assignee of the mortgagor's interest in the property, he might be so entitled, but that would only have given him an equity of redemption, and I do not understand that the appellant wishes to be considered as assignee in any form whatever: and while I agree with the appellant that, if the Subordinate Judge thought it material to the case that appellant should prove his possession between March 1866 and the date on which the sale to Tara-sunker Rai became absolute, an issue should have been framed, and opportunity for adducing evidence on the point should have been given, as the case now stands, it is unnecessary for me to pass any order on this point or upon the appellant's objection to the order for witnesses' expenses. I am of opinion that the order of the Subordinate Judge, so far as it decrees the 4½ bigas of kheraji land, sued for by the plaintiff, ought to be reversed." So that the Judge threw out the suit on a different ground, *viz.*, the validity of the sale on the earlier mortgage deed.

Now the decisions upon the point which I have mentioned, and which is urged by the special respondent are (firstly) one which was referred to at the original hearing in the case of *Gunga Gobind Mandal v. Bani Madhab Ghose* (1). In that case the judgment delivered by Markby, J., contains these words :—" It also appears to me to have been decided by a great preponderance of authority in this Court, although I admit that the decisions are not altogether reconcileable, that a purchaser out and out of the mortgagor's interest, whether by public or private sale, and whether he be in possession or not, must be served with notice, except where any aliena-

tion of the mortgagor's interests has been prohibited by 1874
 contract between the mortgagor and mortgagee." The other BHANOOMUTTY
 case which is still stronger is that of *Mohun Lall Sookool v. CHOWDHRAIN*
Goluck Chunder Dutt (1). In that case their Lordships in v.
 the Privy Council say:—"It is quite clear upon the autho- FRENCHAND
 rities that, if the sale had taken place before the notice of NEOGEE.
 foreclosure was filed, that notice, to be effectual, must have
 been served on the purchaser, and, in the circumstances
 above stated, their Lordships conceive that it ought to have
 been served upon the decree-holder." Baboo Mohini Mohun
 Roy, for the special appellant, contended that a purchaser to
 be entitled to the benefit of these rulings must show himself
 to be a true legal purchaser of the mortgagor's interest. It
 appears to me that that is a refinement which cannot be supported
 out of the rulings; for even if we suppose that the defendant
 would have a difficulty in making out that he had completely
 acquired the interest of the mortgagor; yet it cannot be denied
 that he had purchased an interest, and the interest which pur-
 ported to have been conveyed to him was that of the mortgagor:
 in fact it was a sale of the property out and out. Certainly it
 was the intention of the rulings that a person so circumstanced
 should be entitled to a notice, and that a notice of foreclosure
 shall not bind any purchaser who has not been served with it.
 The Subordinate Judge seems to think that it was necessary to
 prove possession under the purchase, but, from the words used in
 the two cases referred to above, that does not appear to be the
 case. They show that the fact of the purchase alone would entitle
 the purchaser to a notice. We cannot but suspect, as alleged
 by the defendant in his written statement that the plaintiff did
 know perfectly well that the defendant had made this purchase,
 but even if she did not (and it is not necessary to express any
 opinion on that point), the least diligence would have enabled
 her to know that that was the case, and she ought to have then
 served notice on the purchaser. That being so, I think the
 plaintiff's suit might and should have been dismissed on that

(1) 10 Moore's I. A., 14-

1874 ground, and that this special appeal ought to be dismissed with costs.

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v.
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(1) Before Mr. Justice Kemp and
Mr. Justice Birch.

The 11th December 1874.

SHEO GOLAM SINGH AND OTHERS
(DEFENDANTS) v. RAMROOP SINGH
AND OTHERS (PLAINTIFFS).*

Notice of Foreclosure—Reg. XVII
of 1806. s. 8—Assignee of Mortgagor.

The assignee of a mortgagor, though purchaser of only a portion of the mortgaged property, is his "legal representative," within the meaning of s. 8, Reg. XVII of 1806, and as such entitled to notice of foreclosure.

Mr. C. Gregory and Baboo Mohash Chunder Chowdhry for the appellants.

Baboo Chunder Madhub Ghose and Hem Chunder Banerjee for the respondents.

The facts of the case are fully stated in the judgment of the Court which was delivered by

KEMP, J.—THE plaintiff sued for possession of a 3-anna share in a 2-anna of Mauza Royputty; of a 3-anna 2-pie share in the entire 1/3-anna Mauza named Meerpore Bhowal; of a 7-anna 2-pie share in 2/11-anna Mauza named Mothorapore Mahabul; of a 4-anna 2-pie share in one entire 9-anna Mauza named Mujhwa, appertaining to Mahal Royputty, Pergunna Kasnur, basing his right on the ground that he had foreclosed a deed of mortgage, dated the 14th of December 1879. He also sued to set aside an application and vakalatnama dated the 8th of February 1873, which he alleges were fraudulently filed by the defendant to

Appeal dismissed (1).

gain time without the plaintiff's knowledge. He estimates his suit at ten times the public revenue, and alleges that his cause of action arose on the 25th of November 1873, the date on which he foreclosed, and on the 15th of March 1873 the date on which he discovered the defendant's fraud in the matter of the petition and vakalatnama mentioned above.

The plaintiff recites further that for a consideration of Rs. 9,600, the property was mortgaged to the plaintiff, and on a sum of Rs. 12,010-8 becoming due to the plaintiff, the plaintiff applied under the provisions of Regulation XVII of 1806 to foreclose; that previous to the date of the foreclosure, the plaintiff, upon the defendant's entreaties, twice granted him short periods of grace to pay the money; that the last period so granted expired on the 14th of November 1872, and that on the 25th of November of the same year the foreclosure was completed; that, although the defendant subsequently applied for farther grace, the plaintiff refused to grant any further extension of time. Then the plaintiff sets forth the fraud alluded to above.

The mortgagors, defendants, did not appear in this appeal. They appear to be satisfied with the decision of the Court below. The appellant before us is a party who claims to be the legal representative of the mortgagor's *quoad* a certain portion of the properties hypothecated by the mortgagors. The first question, therefore, which we have to consider, is, whether a party in that position is entitled to redeem or

* Regular Appeal, No 287 of 1873, against a decree of the Subordinate Judge of Zilla Sarun, dated the 19th of August 1873.

Before Sir Richard Couch, Kt., Chief Justice, and Mr. Justice Ainslie.

GOBIND PROSHAD TALOOKDAR AND ANOTHER (DEFENDANTS) v.
MOHESH CHUNDER SURMA GHUTTUCK (PLAINTIFF).*

*Hindu Law—Inheritance—Great Grandson of Paternal Grandfather—
Brother's Daughter's Son.*

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Aug. 30.
Sept. 1, 8 &
9; Dec. 14.

By the Hindu law the great grandsons of the paternal grandfather are entitled to succeed as heirs to the deceased proprietor, and are to be preferred to the brother's daughter's son, because, although the former can offer but one oblation, and the latter two, yet that offered by the former is offered to a paternal ancestor, and is therefore of superior religious efficacy to those offered by the latter, which are to maternal ancestors only.

THIS was a suit to recover certain property, which the plaintiff claimed as the heir according to the Hindu law current in

not. That question has been set at rest by the decision of *Ganga Gobind Mandal v. Bani Madhab Ghose* (a) passed by L. S. Jackson and Markby, JJ.

The Subordinate Judge disposes of the question whether the defendants, appellants before us, were entitled to notice in four lines. He says that the notice of foreclosure on the three mortgagors, defendants Nos. 1, 2 and 3, who are not before us, is by all means sufficient in law, and that the defendants, appellants before us, are not entitled to any notice. Then he refuses to go into the question of fraud, inasmuch as he holds that question to be entirely superfluous, because whether the fraud be proved or not proved, the fact of the non-deposit of the entire amount due under the mortgage deed renders the sale absolute and conclusive.

We therefore have first to consider whether the appellants before us were entitled to a notice or not, for if

they were so entitled, the suit of the plaintiff as against them must be dismissed, and will not be necessary for this Court to go into the question whether the mortgagee, the plaintiff, did or did not give the mortgagors further time to pay the mortgage debt, or whether the petition impugned by the plaintiff and the vakalatnama on which the petition is based are fraudulent transactions or not. Now, with reference to the question of notice, we have to look to the terms of s. 8, Regulation XVII of 1806. That section enacts that, whenever a mortgagee is desirous of foreclosing his mortgage and rendering the sale conclusive, on the expiration of the stipulated period, &c., he shall (after demanding payment from the borrower or his representative) apply for that purpose, namely, for the purpose of foreclosing, by a written petition to the Judge of the Zilla or City in which the mortgaged land or other property may

(a) 3 B. L. R., 172.

* Special Appeal, No. 273 of 1874, against a decree of the Subordinate Judge of Zilla Rajshahye, dated the 12th November 1873, affirming a decree of the Munsif of Berajgunge, dated the 29th July 1872.

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Bengal of one Chundee Proshad, deceased. The plaintiff was the brother's daughter's son of Chundee Proshad ; and the first

be situated. And the Judge's duty, on receiving such written application, is to cause the mortgagor or his legal representative to be furnished as soon as possible with a copy of it ; and at the same time notify to him, by a perwanna under his seal and official signature, that if he shall not redeem the property mortgaged in the manner provided for by s. 7 within one year from the date of the notification, the mortgage will be finally foreclosed, and the conditional sale will become conclusive.

Now, in this case, it is necessary to refer to dates. The application by the mortgagee under the Regulation was made on the 2nd of October 1871. The itlanama, or notification, appears to have found its way to the Nasir's office on the 10th of October 1871, but it was not issued by the Nasir until the 12th; and the notice was not served on the mortgagors until the 20th of October 1871.

Under the Full Bench Ruling in *Mahesh Chandra Sen v. Tarini* (a), it has been held by this Court that the year of grace runs, not from the date of the notice, but from the date on which the notice is served. Therefore, the year of grace in this case commenced on the 20th of October 1871. The defendants, appellants before us, purchased a portion of the mortgaged properties on the 9th of October 1871. The deed of conveyance was presented for registration on the 11th of October of the same year, and was registered on the 12th, that is to say, the transaction was completed on the very day on which the notification under s. 8, Regulation XVII of 1806, was

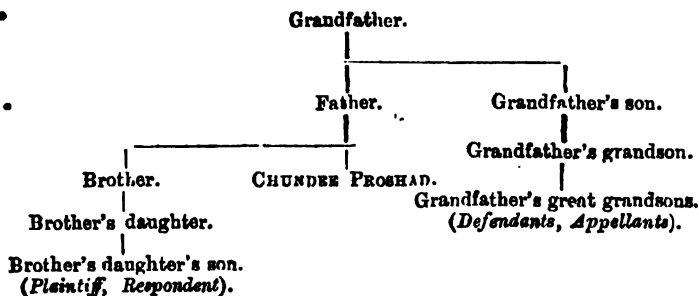
made over to the peon for service. The terms of the mortgage deed provide for the redemption by the mortgagor or his legal representative of any portion or portions of the mortgaged properties. In the deed it is recited what mauzas are mortgaged with the sums which are advanced on each particular mauza, and there is a stipulation that if the mortgagor wishes to redeem any mauza or mauzas mortgaged by the repayment of the sum advanced on each particular mauza, he shall be entitled to redeem such particular mauza. Now, in this case, we have to decide who is the legal representative of the mortgagor with reference to the mauzas involved in the present appeal. The leading case on this point is *Kishen Bullubh Mukta v. Belasoo Commur* (b), decided by Bayley and Phear, JJ. The governing judgment in that case was delivered by Phear J., and that ruling has since been followed in several other cases by various Benches of this Court. The learned Judge observes in treating of what is the meaning of the term "mortgagor's legal representative," that the words naturally designate that person, who either by law, or by contract between the parties succeeds the mortgagor, whether mediately or immediately, in the position which he holds relative to the mortgagee in respect of the property which is the subject of the mortgage ; that a succession of this kind may occur either by reason of the death of the mortgagor, or by assignment of the equity of redemption if the assignment is not inconsistent with the terms of the original mortgage ; that when

(a) 1 B. L. R., F. B., 15.

(b) 3 W. B., 230.

and second defendants were Chundee Proshad's paternal grandfather's great grandsons in the male line. Kripamoyee, the wife of Chundee Proshad, survived him, and died in Baisakh 1278 (1871).

The following table shows the relationship between the parties :



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 GRUTTUCK.

Both the lower Courts decided in favor of the plaintiff. The defendants appealed.

Baboos *Rash Behari Ghose* and *Golap Chunder Sirkar* for the appellants.

Baboo *Issur Chunder Chuckerbutty* for the respondent.

the mortgagee desires to foreclose, cognizant of the purchase by the there can be no practical difficulty in ascertaining whether the equity of redemption, as against the mortgagee, is in the hands of the original mortgagor himself or in those of one of the substitutes for him which the learned Judge describes, and that in whichever of these it is found to be, to that one, in the learned Judge's judgment, the notice must be issued in order to initiate the year of grace, whether such assignment was effected by public or by private sale ; but that when once the year of grace is set running, no subsequent assignment of the equity of redemption can stop it. Now, in this case, it was very clear that the appellants before us are, with reference to the remarks quoted above, the legal representatives of the mortgagor, and there is also every reason to believe that the mortgagee was

appellants, for we find that he was a witness to the deed of conveyance, and it is clear that no notification, such as is contemplated by s. 8 of the Regulation quoted above, was issued and served upon the mortgagor or his legal representatives the appellants before us before the appellants acquired the right to the equity of redemption under the deed of conveyance in October 1871.

Holding, therefore, that the appellants, who are the legal representatives of the original mortgagor, with reference to a portion of this property, were entitled to a notice, we reverse the decision of the Subordinate Judge Mr. S. Dacosta, and dismiss the plaintiff's suit in so far as the appellants before us are concerned with costs of both Courts.

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Baboo Rash Behari Ghose.—Previous to the Full Bench Ruling in *Guru Gobind Shaha Mandal v. Anand Lal Ghose Mazumdar* (1), persons in the same category with the brother's daughter's son were not recognized as heirs. In that case they were held to be heirs, but their position in the order of succession was not determined. According to the Hindu law, however, the *gotrajas*, or gentiles, are preferred to the *bandhus*, or kinsmen who claim relationship through a female; see the *Dayabhaga*, Ch. xi, s. 1, paras, 4 and 5. It is by virtue of a special text that the daughter's son is held to be an heir succeeding in preference to the father and other agnates; see the *Dayabhaga*, Ch. xi, s. 2, para. 19. Following the analogy of the daughter's son of the deceased proprietor, the daughter's sons of the father and the two other paternal ancestors are regarded as heirs. The author of the *Dayabhaga* explains the term "gentiles" occurring in *Yajnavalkya* text (*Dayabhaga*, Ch. xi, s. 1, para 4) as including the daughter's sons of the owner and his three paternal ancestors; see the *Dayabhaga*, Ch. xi, s. 6 para 10. The order of the succession down to the great grandfather's daughter's son has been expressly specified by the author of the *Dayabhaga* in language not to be mistaken; see the *Dayabhaga*, Ch. xi, s. 6, para. 9. If the contention of the other side be correct, then the father's son's daughter's son would succeed before the father's father, and consequently the owner's son's daughter's son would come before the owner's father. But that would be contradictory to what the author of the *Dayabhaga* lays down in Ch. xi, s. 3, para. 1. In that case the entire order of succession would be unsettled, for there are seven persons in a similar position with the brother's daughter's son, viz., the daughter's son of the son and of the grandson of the owner himself, as well as of his father, grandfather, and great grandfather. Therefore, according to the order of succession as specified by the author of the *Dayabhaga*, the brother's daughter's son cannot be placed before the grandfather's great grandson.

The synopsis of the order of succession agreeably to the *Dayabhaga*, as recapitulated by Srikrishna in his commentary

on that work, supports the contention of the appellants ; see Dayabhaga, the latter portion of Ch. xi. Jagannatha also supports the contention of the appellants ; see 4 Colebrooke's Digest, p. 230. the only authority that supports the contention of the respondent is Srikrishna's Dayakrama Sangraha ; see Wynch's Dayakrama Sangraha, p. 19 ; but there are many reasons to suppose that passage to be an interpolation—*Gobindo Hureekar v. Woomesh Chunder Roy* (1). It does not exist in many copies of the book ; see the statement of the Pundit in 2 Macnaghten's Hindu Law, p. 77 : Colebrooke's copy could not have contained it, see his remarks at the end of ch. vi of the Dayabhaga. And it is inconsistent with the passage which immediately follows it, and also with Srikrishna's commentary on the Dayabhaga. The reason assigned for the succession of the brother's daughter's son is equally applicable to seven other relatives ; but they are not all mentioned in the Dayakrama Sangraha as heirs. The decision in *Guru Gobind Shaha Mandal v. Anand Lal Ghose Mozumdar* (1) does not at all allude to Srikrishna's Dayakrama Sangraha. The reason given in that case for enumerating the paternal uncle's daughter's son as an heir is that he also confers spiritual benefits on the deceased by offering oblations ; but the number of cakes offered which are partaken of by the deceased is no criterion of the amount of spiritual benefit conferred. The cakes offered to maternal ancestors are inferior to those offered to paternal ancestors in their power of conferring spiritual benefit ; see *Guru Gobind Shaha Mandal v. Anand Lal Ghose Mozumdar*, (2), and 4 Colebrooke's Digest, Calc. ed. of 1798, p. 230. The capacity of conferring spiritual benefit by the sons of female relatives is very limited, because as they cannot present oblations so long as their father is alive (see Dayabhaga, Ch. xi, s. 6, para. 29) they do not begin to confer any benefit until after the death of their father, which may occur many years after the death of the owner ; and if the daughter's son predecease his father, then he does not confer the slightest benefit.

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(1) W. R. F. B., 176.

(2) 5 B. L. R., 15.

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Moreover, whatever spiritual benefit is conferred by the daughter's son, ends with his death; since his son does not in any way conduce to the spiritual welfare of the deceased proprietor; see *Dayabhaga*, Ch. xi, s. 3, para. 3. Such is the case with all the cognates who present oblations which are enjoyed by the deceased. But the agnates not only confer spiritual benefits during the life time, but their descendants also, by offering funeral oblations and libations of water, continue to conduce to the spiritual welfare of the deceased.

Bahoo Issur Chunder Chuckerbutty for the respondent—It is conceded on the authority of *Guru Gobind Shaha Mandal v. Anand Lal Ghose Mozumdar* (1) that the respondent, who is the brother's daughter's son, is a *sapinda*, or heir of the first class. It is there held that the inheritance goes to the nearest *sapinda*, or the person capable of conferring the greatest amount of spiritual benefit on the deceased. The brother's daughter's son admittedly offers one oblation to the father, and another to the grandfather, of the deceased, in both which the deceased participates; whereas the grandfather's great grandson offers only a single oblation in which the deceased participates, namely, to the grandfather of the deceased: therefore the former confers greater benefit.

The arrangement of Ch. xi, ss. 1, 2, 3, 4, 5, and the 8th verse of s. 6 show in what order different individuals come in as heirs one after another; but after the father's daughter's son no particular individual is named, but a class of persons is given as taking next. The conclusion of the author is to be found in s. 6, v. 20. The grandfather is not expressly mentioned in that verse, although he admittedly takes next after the father's daughter's son. In like manner the brother's daughter's son, though not expressly mentioned, comes within the class "or other person who is a giver of three oblations presented to the father, and which the deceased shares, or which he was bound to offer."

On the authority of *Jaganatha* (4 *Colebrooke's Digest*, p. 230) it has been contended that the oblations offered by the paternal

(1) 5 B. L. R., 15.

grandfather's great grandsons (the appellants in this case) are secondary in importance. Before examining the passage cited, I would point out that Jagannatha has never been received as a high authority where he is not supported by texts or by other commentators. In the recent Full Bench case of *Kery Kolitany v. Moneeram Kolita* (1), Jackson, J., says: "As to Jaganatha Tarkopanchanana, admitting fully his vast and noted erudition, I do not think he would be a safe guide for the Courts, on the strength of his own opinion upon such a matter: He seems indeed to be, like many of the writers on Hindu law, a merely learned person, neither judge nor lawyer but pundit and logician, and without their merits of being accurate and precise." Mr. Colebrooke also in his preface to the *Dayabhaga*, p. 2, says: "In the preface to the translation of the Digest I hinted an opinion unfavorable to the arrangement of it, as it has been executed by the native compiler. I have been confirmed in that opinion of the compilation, since its publication, and indeed the author's method of discussing together the discordant opinions maintained by the lawyers of the several schools, without distinguishing in any intelligible manner which of them is the received doctrine of each school, but, on the contrary, leaving it uncertain whether any of the opinions stated by him do actually prevail or which doctrine must now be considered to be in force and which obsolete, renders his work of little utility to persons conversant with the law, and of still less service to those who are not versed in Indian jurisprudence, &c." And similar opinions are expressed by Mr. Macnaghten (see the Preface to his *Considerations on Hindu Law*, p. 8) and by Sir Thos. Strange (see the Preface to 1 *Hindu Law*, p. 18.)

But on reading the passage cited, it seems Jagannatha is discussing there why a son's daughter's son is excluded by the father, or does not inherit before the father, although he confers greater spiritual benefit on the deceased than the father, and gives as his reason for such exclusion that the oblations of the father are primary, and those of the daughter's son's are secondary, in importance. Jagannatha does not cite any authority to support this argument. He might have given a very good

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reason, viz., that the father succeeds under special texts ; but he gives a false reason in which he is contradicted by the Dayabhaga; see Dayabhaga, Ch. xi, s. 6, vv. 12 and 13. These verses show that the author of the Dayabhaga draws a distinction between the oblations in which a man participates and the oblations which he was bound to offer. A deceased person participates in the oblations offered to his paternal ancestors, but he does not participate in oblations which are offered to his maternal ancestors although he was bound to offer such oblations himself. The first mentioned oblations are primary, because the persons offering them benefit the deceased in a greater degree, and such persons are therefore preferred to those who offer the latter oblations, which the deceased was only bound to offer but not entitled to participate in. Hence the succession of the maternal ancestors or of those that offer oblations to the maternal ancestors is postponed in favor of the paternal ancestors or of those that present offerings to the paternal ancestors. The oblations are primary or secondary as having reference to the deceased proprietor, and not to the person offering them. This distinction was lost sight of in the argument on behalf of the appellants. The respondent presents offerings to his own maternal ancestors no doubt, but to the paternal ancestors of the deceased, in which the deceased partakes : and therefore those oblations are primary in their nature and importance.

Baboo *Rash Behari Ghose* in reply.—It is true that the respondent offers two oblations, but the reason given for saying that those oblations are of superior efficacy, is not a valid reason ; for although they are offered to persons who are the paternal ancestors of the deceased, those same persons are only the maternal ancestors of the respondent himself ; whereas the one oblation offered by the defendant is to a paternal ancestor of the deceased, who is also a paternal ancestor of their own.

Cur. adv. vult.

The judgment was delivered by

COUCH, C.J.—(who, after shortly stating the facts of the case continued).—The question thus raised is one upon which the

authorities upon the law in Bengal do not agree. In the *Dayabhaga*, Ch. xi, s. 6, v. 9, it is said : "The succession of the grandfather's and great grandfather's lineal descendants, including the daughter's son, must be understood in a similar manner, according to the proximity of the funeral offering ; since the reason stated in the text, 'for even the son of a daughter delivers him in the next world, like the son of a son,' is equally applicable ; and his father's or grandfather's daughter's son, like his own daughter's son, transports his manes over the abyss by offering oblations, of which he may partake." The verse which precedes this is : "But, on failure of heirs of the father down to the great grandson, it must be understood that the succession devolves on the father's daughter's son (in preference to the uncle) in like manner as it descends to the owner's daughter's son (on failure of the male issue, in preference to the brother)." The brother's daughter's son, or grandfather's granddaughter's son, is not included here. It is only a daughter's son who is included with the lineal descendants, the reason for it being given. The brother's daughter's son is not anywhere expressly mentioned by this author ; but he is, nevertheless, entitled to be recognized as an heir for the reasons given in the judgment which we shall presently refer to. In *Srikishna's Commentary* on the *Dayabhaga*, the brother's daughter's son is in like manner omitted, but in the *Dayakrama Sangraha* he states a different rule. Ch. i, s. 10, v. 1, is : "On failure of the brother's grandson, the succession goes to the father's daughter's son, for he presents three funeral oblations, namely, to the father, paternal grandfather, and paternal great grandfather of the deceased owner,—i.e., to his own maternal grandfather, maternal great grandfather, and maternal great great grandfather." V. 2 is : "In default of the father's daughter's son, the brother's daughter's son succeeds, for he presents two funeral cakes, in which the deceased owner participates,—namely to his (the owner's) father and paternal grandfather." V. 3 is : "Failing him, the paternal grandfather is the successor, for as the father is entitled to succeed on a failure of the heirs of the deceased owner ending with the daughter's son, so by the rule of analogy the succession devolves on the grandfather

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in default of heirs down to the father's daughter's son ; and because he presents one oblation (namely, to the owner's paternal great grandfather, i.e., his own father) in which the deceased owner participates." The three verses are not consistent. It by "failing him" in the 3rd is meant the brother's daughter's son, who is named in the 2nd, there is an inconsistency with the words "so by analogy the succession devolves on the grandfather in default of heirs down to the father's daughter's son." But if the second verse be omitted, "failing him" will refer to the father's daughter's son named in the first, and there will be no inconsistency. In the first verse the author gives a different reason for the succession going to the father's daughter's son from that given in the Dayabhaga- It is the presentation of three oblations, but they are to maternal ancestors. So are the oblations mentioned in v. 2, but the one oblation in v. 3 is to a paternal ancestor. An appearance of consistency is given to the three verses by treating this as only of the same efficacy as an oblation to a maternal ancestor and making the succession go according to the number of oblations. But this seems not to be correct. In Colebrooke's Digest, Bk. 5, Ch. viii, sec. 1, it is said in the commentary on v. 434 by Jagannatha : "The oblations presented to the maternal grandfather and the rest are secondary, because they must follow funeral cakes offered to paternal ancestors ; the son of a granddaughter can have no claim, while the giver or sharer of a principal oblation exists. Nor should it be objected as a consequence that the son of the late proprietor's daughter, or of his father's daughter and so forth, could have no title, if any kinsman within the degree of a *supinda* were living. The Mahabharata showing that a daughter's son procures advantage even by his birth alone (ov), it appears that he does confer important benefits."

Srikrishna deals with the uncle's daughter's son and paternal grandfather's daughter's son in the same way in vv. 9 and 13, but when he comes to the heirs on the maternal side, they are omitted. According to the Dayatatwa, on failure of the heirs of the father down to his daughter's son, the paternal grandfather succeeds ; on failure of him, the paternal grand-

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mother ; in default of her, the descendants of the paternal grandfather, including his daughter's son ; in their default, the paternal great grandfather, paternal great grandmother, and the descendants of the paternal great grandfather, including his daughter's son, succeed. Previous decisions having been overruled by a Full Bench decision of this Court, it will be better at once to refer to that. In *Guru Gobind Shaha Mandal v. Anand Lal Ghose Mazumdar* (1) the question was whether, under the Hindu law current in the Bengal school, the son of a paternal uncle's daughter is entitled to succeed to the estate of a deceased Hindu, if no nearer heirs are forthcoming, Mitter, J., who delivered the judgment, began by saying : " The solution of this question depends upon the true construction of the Dayabhaga, a treatise on the Hindu law of inheritance by Jimuta Vahana, the acknowledged founder and chief of the Bengal school. The other authorities current in that school, such as the Dayakrama Sangraha of Srikrishna Tarkalankar, the Dayatatwa of Raghunandana, and the Vivada Bhangamat of Jagannatha Tarkapanchanana are all of them almost exclusively founded on the Dayabhaga, and such a difference of opinion as there is between them and the fundamental treatise is entirely confined to a few cases of detail which involve no conflict of principal of any kind whatever. Such then being the state of our authorities, it is necessary first of all to ascertain whether the Dayabhaga itself is founded on any general doctrine or principle, which will enable us to arrive at a satisfactory conclusion on the point now under our consideration. We are of opinion that there is such a principle, and it is no other than that of spiritual benefit. That the Hindu law of inheritance, in the widest acceptation of the term, is essentially based upon considerations relating to the spiritual welfare of the deceased proprietor, is a proposition beyond all dispute. All the ancient Rishis, or Hindu sages, whose texts are regarded as the fundamental source of that law, and all the commentators on it whose opinions are recognized as authorities in the different schools current in the country, are unanimously agreed in accepting these considerations as their chief, if not as

(1) 5 B. L. R., 15, at p. 34.

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their exclusive, guide. The author of the *Dayabhaga* is no exception to the rule. On the contrary, he is clearly and expressly of opinion, as we will presently show, that the whole theory of inheritance is founded upon the principle of spiritual benefit, and that it is by that principle alone that questions relating to it must be determined." After illustrating and enforcing this proposition, the learned Judge says (1) : "As to the male heirs we may divide them for the sake of convenience into the following classes :

" 1. *Sapindas*, strictly so called, or in other words, relatives connected through the medium of undivided oblations.

" 2. *Sakulayas*, or relatives connected through the medium of divided oblations.

" 3. *Samanodakas*, or relatives connected by libations of water.

" 4. Certain specified strangers, commencing with the spiritual preceptor, and ending with the learned Brahmin of the same village, leaving aside the king, who is entitled to come in more by right of escheat than by that of inheritance.

" Here again we find that the same principle is in operation throughout. The *sapindas* are allowed to come in before the *sakulayas*, because undivided oblations are considered to be of higher spiritual value than divided ones ; and the *sakulayas* are in their turn preferred to the *samanodakas*, because, divided oblations are considered to be more valuable than libations of water. The members of the last class are not competent, it is true, to offer either oblations of food or libations of water ; but even in their case the doctrine of spiritual benefit is not forgotten. Thus, for instance, the lowest amongst them, namely the learned Brahmin of the same village, is allowed to come in upon the express ground that the virtue of the deceased proprietor is 'renewed by the acquisition of fresh merit through the circumstance of his wealth devolving on a Brahmin,—v. 26, s. 6, Ch. xi. This, no doubt, is an extreme case of the kind ; but we wish to draw particular attention to it as an instance of the extreme solicitude evinced by the author of the *Dayabhaga* to provide for the spiritual welfare

(1) 5 B. L. R., 15, at p. 33.

of a deceased proprietor. Again, when we come to look at the internal arrangement of each of these classes, so far as the details of such arrangement are actually given in the *Dayabhaga*, we find that the same principle is always kept in view. Thus, among the *sapindas*, those who are competent to offer funeral cakes to the paternal ancestors of the deceased proprietor are invariably preferred to those who are competent to offer such cakes to his maternal ancestors only; and the reason assigned for the distinction is that the first kind of cakes are of superior religious efficacy in comparison to the second. Similarly, those who offer larger numbers of cakes of a particular description are invariably preferred to those who offer a less number of cakes of the same description; and where the number of such cakes is equal, those that are offered to nearer ancestors are always preferred to those offered to more distant ones." He then determines that the son of a paternal uncle's daughter is competent to confer spiritual benefit on the deceased proprietor. Referring to the objections that had been urged against his right he says, that his being nowhere mentioned as an heir in the *Dayabhaga* is entitled to no weight whatever. And referring to an argument that the precise position which the son of a paternal uncle's daughter would be entitled to hold according to the principle of spiritual benefit would interfere with that which has been assigned by the author of the *Dayabhaga* to some of the heirs specified in the earlier part of Ch. xi, he says (1): "Whether this is really the case or not we need not pause to enquire, for what we have to determine in the present case is not the precise position which the son of a paternal uncle's daughter is entitled to occupy in the category of heirs, but whether he is entitled to inherit at all." If the author of the *Dayabhaga* has in fact given to any particular heir or heirs a position which is not strictly consistent with the principle which he has himself laid down for our guidance, the utmost that can be said is that that particular heir or heirs should be allowed to retain that position. But that circumstance, even if true, cannot be accepted as a sufficient reason to justify the total exclusion of one single individual who is really competent

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to satisfy all the requirements of that principle. If in any case which may arise hereafter, it should become necessary for us to determine the precise position which the son of a paternal uncle's daughter is entitled to hold in the order of succession, the question would fairly arise whether the details of a work like the Dayabhaga ought to be permitted to override the principle upon which it is admittedly based. We have already shown that, according to the author's own interpretation of Menu, the nearest heir is he "who is competent to confer the greatest amount of spiritual benefit on the deceased proprietor." Now it is to be observed that in this judgment the passages in the Dayakrama Sangraha, which are expressly in point, are nowhere relied upon. They are not even referred to by Mitter, J. In *Gobindo Hureskar v. Woomes Chunder Roy* (1) the learned Judge, being counsel for the appellant, had convinced three Judges of this Court, one being Shumbhoo-nath Pundit, J., that the passage declaring the right of a brother's daughter's son to succeed as heir is an interpolation, and no part of the original text of Srikrishna. It is true that the decision in that case that a paternal uncle's daughter's son cannot inherit is overruled; but it is not upon the authority of the Dayakrama Sangraha, and the question which would be settled by it is deliberately left an open one. We may then at least say that the authority of the Dayakrama Sangraha upon the question before us is so doubtful that we may disregard it; and with it must be placed the authorities which are only founded upon it. We must consider which of the parties to this suit are competent to confer the greatest amount of spiritual benefit on Chundee Proshad. The defendants offer one oblation in which he participates,—namely to his grandfather and their great grandfather. The plaintiff offers two, namely, to his father and grandfather, being the plaintiff's great grandfather and great great grandfather. But these are maternal ancestors of the plaintiff, whilst the oblation of the defendants is offered to a paternal ancestor. Mitter, J., in one of the passages already quoted, says that among the *sapindas* those who are competent to offer funeral cakes to the paternal ancestors of the deceased proprietor are

invariably preferred to those who are competent to offer such cakes to maternal ancestors only, because the first kind of cakes are of superior religious efficacy in comparison with the second. The oblations offered by the defendants being of superior religious efficacy to those offered by the plaintiff, both being participated in by the paternal ancestors of the deceased proprietor, it seems to follow that the defendants should be preferred. The difference of number is not a ground of preference when the cakes are not of the same description. "Similarly," Mr. Justice Mitter says, "those who offer a larger number of cakes of a particular description are invariably preferred to those who offer a less number of cakes of the same description." It is true that the author of the Dayabhaga makes three exceptions to this order of succession in the father's grandfather's and great-grandfather's daughter's son, but a special reason is given for it, which is not applicable to others. Adopting the principle of the Full Bench decision, that of spiritual benefit, it appears to us that the defendants ought to be preferred to the plaintiff, and are now the heirs of Chundee Proshad. The decrees of the Lower Courts will therefore be reversed, and the suit will be dismissed with costs in all the Courts.

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Appeal allowed.

Before Mr. Justice Phear and Mr. Justice Morris.

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(PLAINTIFF).*

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Dec. 17.

Act IX of 1847, ss. 6 & 9—Right of Suit—Effect of an Order for Additional Assessment.

Certain land, which formed part of the plaintiff's zemindari, became, on its re-formation after submergence by a change in the course of the river Ganges, attached to the zemindari of J, and it being found so attached an additional jama was, after proceedings taken by the Revenue Authorities under Act IX of 1847, assessed against J in respect of it. In a suit in the Civil Court brought by the plaintiff against the Government, J, and L, an ijaradar under J,

* Regular Appeal, No. 252 of 1873, against a decree of the Judge of Zilla Dinagepore, dated the 30th June 1873.

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to recover possession of the land,—held, that the suit was not barred by the proceedings under Act IX of 1847. S. 6 of that Act makes the order passed under its provisions final only against the zemindar, not against third persons. Nor would s. 9 bar the suit; the words of that section do not necessarily extend to forbidding a suit brought to recover property which the Government or its officers may be instrumental in keeping away from the rightful owner.

Held on the facts, that the Government had not, by the proceedings under Act IX of 1847, or otherwise, interfered with the plaintiff's rights so as to entitle him to relief against it in the present suit.

Baboo Annoda Persad Banerjee and Mohini Mohun Roy
for the appellants.

Baboo Sreenath Doss and Tarucknath Sen for the respondent.

THE facts and arguments in this case are sufficiently stated in the judgment of the Court which was delivered by

PHEAR, J.—The essential facts of the plaintiff's case are that the property which is the subject of suit originally formed part of his zemindari Sultangunge in the District of Malda, was surveyed by the Revenue Authorities as being a portion of that zemindari in the year 1847, and was from that time onwards, until the year 1861 or 1862, possessed and enjoyed by him the plaintiff as a substantive portion of Sultangunge. About that time the Ganges, by changing its course, flowed over and submerged this portion of the plaintiff's zemindari; and this land remained submerged for two or three years until the Ganges by a further change in the same direction as before allowed it to emerge from the waters on the other side, so to speak, of the river. And in this state, it became attached to Mauza Gobindrampore, part of the zemindari of the second defendant, Rao Jogendro Narain Roy. After this occurrence, the plaintiff regained possession and enjoyment of this piece of land to a certain extent when he was dispossessed by Mr. Thomas Lyon acting under the authority of an ijara lease which he had obtained from the defendant Jogendro Narain Roy.

At this stage of matters, the Survey Authorities came upon the scene, and finding this piece of land added to the zemindari

of Jogendro Narain, they took proceedings under Act IX of 1847, and assessed an additional jama in respect of this land against Jogendro Narain Roy.

The plaintiff complains in this suit, which he has brought against the Government, Jogendro Narain and Mr. Lyon, that by these proceedings on the part of the Government, the zemindar and the ijaradar jointly, he has been wrongly dispossessed of the property for which he sues.

The Government do not in this appeal seriously contest the facts of the case as alleged by the plaintiff, but maintain that the revenue proceedings, taken under Act IX of 1847, had the effect of concluding the matter, not only between Government and Jogendro Narain Roy, but between Government and everybody else including the present plaintiff, and that this suit will not lie.

The defendant Jogendro Narain Roy disputes the principal allegations of the plaintiff. But Mr. Lyon does not appear in this appeal.

We do not think it necessary to discuss in detail the evidence which has been given by the plaintiff. The lower Court has arrived at the conclusion upon that evidence that the principal facts alleged in the plaint are completely established. And we see no good reason for differing from the Judge upon this point.

It is almost beyond question that the land, which is the subject of suit, was included within the zemindari of Sultangunge as surveyed in 1847. It seems from the report of the Ameen that this land can be distinctly identified as forming a portion of the land which was mapped in 1847; and we think that the plaintiff has, by his evidence, satisfactorily made out, that, until at any rate 1862 or 1863 when the Ganges passed over the land, he had enjoyed it as a portion of his zemindari. The witnesses speak to a limited amount of occupation and enjoyment of this land even after the Ganges had again shifted its course so as to allow this land to emerge from the water. And we see no good reason for doubting the substantial truth of their testimony in this matter. There is nothing of any weight to be put against it. And, on the whole, it appears to us, that we should not be justified in disturbing the finding of the lower Court with regard to the facts of the case.

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This being so, it follows that as against Jogendro Narain and Mr. Lyon, the plaintiff has made out a good title to this property. And the question next arises, is he by reason of the survey proceedings under Act IX of 1847 barred from recovering his property from the hands of these defendants on the strength of his title? His suit is not barred by the operation of the ordinary Acts of Limitation, because, according to the facts which we think are undoubtedly established, he had actual enjoyment of it long within the period prescribed by those Acts for the limitation of suits. The question, whether the proceedings taken under Act IX, and the final decision come to by the Commissioner upon those proceedings, had the effect of barring the plaintiff from bringing this suit even against the trespassers Jogendro Narain and Mr. Lyon, depends upon the proper interpretation of Act IX of 1847.

The Act itself is entitled "An Act regarding the assessment of lands gained from the sea or from rivers by alluvion or dereliction within the Provinces of Bengal, Behar, and Orissa." And to some extent, this marks out the scope of the Act. From these words, we should gather that it was intended to apply only to a subject which was gained from the sea or from rivers by alluvion or dereliction—not to land seemingly gained from another proprietor by the mere changing of a river's course. And the words of the preamble tend in the same direction. The Act then goes on to provide that periodical surveys of lands on the banks of rivers and on the shores of seas shall be made in order to ascertain the changes that may have taken place since the date of the last previous survey, and new maps shall be made from time to time.

In s. 5, it is enacted that, "whenever on inspection of any such new map it shall appear to the Local Revenue Authorities that land has been washed away from, or lost to, any estate paying revenue directly to Government, they shall, without loss of time, make a deduction from the sudder jama of the said estate equal to so much of the whole sudder jama of the estate as bears to the whole the same proportion as the mofussil jama of the land lost bears to the mofussil jama

of the whole estate, &c." And in the 6th section it is enacted that, "whenever, on inspection of any such new map, it shall appear to the Local Revenue Authorities that land has been added to any estate paying revenue directly to Government, they shall without delay assess the same with a revenue payable to Government according to the rules in force for assessing alluvial increments, and shall report their proceedings forthwith to the Sudder Board of Revenue, whose orders thereupon shall be final." It seems to be very clear that the action, which the Government of Bengal is empowered to take by this Act, has direct reference to the land, which is at any time found in the possession of a zemindar, and enjoyed by him as a part of his zemindari bordering on the sea or on a river, and apparently gained therefrom. When the land so possessed by him is found by a comparison of the new map with the old map to be in excess of what he had previously been possessed of as constituting his zemindari, the Government is empowered to make an addition to the jama which is payable by him in respect of his zemindari. And all orders that may be made by Government in this matter, are, by the words of s. 6, rendered final; that is, as regards the person whom they may directly affect, namely, the zemindar.

In the case which is before us, as has been already stated, the plaintiff complains that the principal defendant, Jogendro Narain Roy, has, under cover of the Government survey proceedings, taken away from him a portion of his properties. And, no doubt, the Survey Authorities, when they made the new survey in 1866-1867, were led by some means to suppose that this piece of land, which the evidence given before us shows to be land belonging to the plaintiff, was at the time of the new survey possessed and enjoyed by Jogendro Narain as part of, or as land added to, his zemindari. And upon that state of facts it was settled with him, and an additional jama was assessed in respect of it upon his zemindari. So far as that addition to his jama is concerned, the orders of the Revenue Authorities are made final by s. 6, Act IX of 1847. But so far as the assumption of fact made by the Revenue Authorities, to the effect that this piece of land was land which had

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been gained by Jogendro Narain from the river by alluvion, is concerned, there was no actual order made. And we think it never was the intention of the legislature that any order or declaration which might be considered as implied in that respect, by reason of the formal settlement of the land with Jogendro, should be made final by the words of s. 6 against third parties. So that in our view, the order which was passed by the Revenue Authorities in 1866-1867, assessing this additional jama upon the zamindari of Jogendro Narain, does not operate to take away the right which the plaintiff has to seek by a suit in the Civil Court to recover his property from the hands of those who are keeping it from him.

But it is further said that s. 9 of this Act IX of 1847 bars the suit. The section runs in these words:—"And it is hereby enacted, that, except as regards the proprietary right to islands no suit or action in any Court of Justice shall lie against the Government, or any of its officers, on account of anything done in good faith in the exercise of the powers conferred by this Act." And it is argued that the plaintiff is by these words barred from bringing a suit against the Collector as representative of Government to recover this property, and, if barred against the Collector, he is also barred from bringing his suit against Jogendro Narain Roy and Mr. Lyon, who have had this property settled with them by the action of the Revenue Authorities.

It does not appear to us that this argument ought to prevail, in its entirety at any rate. In the view we have taken of the facts, it is perhaps not necessary for us to express a judicial opinion as to whether the words of this section would bar a suit of this kind from being brought against the Government, if the property sought to be recovered was actually in the hands and under the control of the Government. Speaking for myself alone, I may say that I do not at present see any reason to alter the view which I expressed on a former occasion in the case of *Poorna Chunder Roy v. Balfour* (1), with regard to the meaning of an enactment somewhat similar to this section, namely, a

portion of s. 87 of the Municipal Act (Beng. Act III of 1864). To me the words of this section seem to be limited to forbidding a suit wherein the plaintiff seeks to make Government, or any of its officers, responsible in damages on account of anything done in good faith in the exercise of the powers conferred by this Act; and do not necessarily extend to forbidding a suit which is brought to recover property, which either the Government or its officers might be instrumental in keeping away from the rightful owner. And it seems to me that the exception as regards the proprietary right to islands strengthens this view.

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But however this may be, we think that upon the facts of this case, and evidence which has been given, the plaintiff's suit, so far as concerns the Government, fails. Neither the Collector nor the Revenue Officers have done anything to take the property out of the hands of the plaintiff, or to keep it away from him. Under Act IX of 1847, the Revenue Officers could not rightly take action until they found the land which was sought to be assessed in the hands of the zemindar or whose zemindari it seemed to be added. Obviously the land must be added to the zemindari before the new assessment in respect of it can be made. And it appears to us upon the evidence in this case, that in the new survey of 1866-1867, by which this land was *thakke*d with the zemindari of the defendant, Gobind-rampore, proceedings were taken by the Revenue Officers *bonâ fide*, upon the land being ascertained by them to be in the possession of the defendant or of his people. They did not themselves deprive the plaintiff of possession of the land, or assist the other defendant in keeping him out of it. Neither did they, by making the new settlement, pretend to deal with the land, and convey it to Jogendro Narain adversely to the plaintiff's rights. In short, the plaintiff has not satisfied us that the Government has directly invaded or hostilely threatened his proprietary right, and has not shown any good cause for our making a judicial declaration of his right as against it. Therefore the decree in favor of the plaintiff in this suit ought to be limited to a decree against the defendant Jogendro Narain Roy and Mr. Lyon. In our view the suit, as against the Collector representing the Government, ought to be dismissed. In ordi-

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nery course this would be with costs; but regard being had to the defence which has been unnecessarily set up on the part of the Government, not only in the Court below but in this Court, that is to the effect that the action taken by the Government had the effect of transferring the property from the hands of the plaintiff to the defendant, we are of opinion that the Government is not entitled to its costs.

We think that as regards the defendant Jogendro Narain, the appeal should be dismissed with costs, and the decree of the lower Court affirmed; but, as regards the Government, the decree of the lower Court must be reversed, and the suit dismissed without costs.

We do not think we ought to interfere with the order made in the lower Court, directing Jogendro Narain to pay the costs of Mr. Lyon.

Appeal allowed as regarded the Government, and dismissed as regarded the other appellant.

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Before Mr. Justice Phear and Mr. Justice Morris.

GOBINDO COOMAR CHOWDHRY (PLAINTIFF) v. W. B. MANSON AND OTHERS (DEFENDANTS).

W. B. MANSON (ONE OF THE DEFENDANTS) v. GOBINDO COOMAR CHOWDHRY (PLAINTIFF).*

Limitation—Act XIV of 1859, cl. 1, ss. 1 & 14—Act X of 1859, s. 32—Beng. Act VIII of 1869, ss. 21 & 29—Suit for Arrears of Rent—zemindar Talookdars—Joint Share.

The words of s. 29, Beng. Act VIII of 1869, are intended to apply specially, and exclusively of Act XIV of 1859, to the same class of cases as those to which s. 32, Act X of 1859, applied, though that class cannot now be defined as it formerly could, by reference to the jurisdiction of the Court in which the cases fall to be entertained. The class is limited to suits for arrears of rent simply, as "arrears of rent" are defined in s. 21, Beng. Act VIII of 1869.

* Regular Appeals, Nos. 255 and 268 of 1873, against a decree of the Subordinate Judge of Zilla Mymensingh, dated the 9th July 1873

Where a part-proprietor of a certain talook, who was also a co-sharer in a fractional portion thereof, brought suits against his co-talookdars in the Revenue Court for arrears of rent without allowing any deduction on account of his share, which suits were dismissed for want of jurisdiction, and afterwards brought a suit for the rent for the same period in the Civil Court,—*held*, that the suit was not one for the recovery of arrears of rent within the meaning of s. 29, Beng. Act VIII of 1869, but was governed by the provisions of Act XIV of 1859. The suit was one for rent of land, and fell within the scope of cl. 8, s. 1 of that Act; and the plaintiff was, in computing the limitation, entitled under s. 14 to a deduction of the period during which he was prosecuting his suit in the Revenue Courts. *Held* also, that a zemindar, by becoming a co-sharer in the talook, does not lose his right to the joint responsibility of all the other co-sharers for the due payment of the rent; he only becomes bound to make an allowance for that portion which he as a co-sharer ought to pay.

THE plaintiff in this suit was the proprietor of a 4-anna share in Talook Rajessuri. This talook belonged to, and was in the possession of, several talookdars, holding under the zemindar by apportionment into kismats, each kismat being held jointly by two or three shareholders in undivided but ascertained shares. The plaintiff had also acquired by purchase an 8-gunda talookdari share in one of the kismats: The talook bore a fixed jama, a defined aliquot part whereof was assessed upon each of the constituent kismats or mehals of the talook, but no apportionment had taken place among the talookdars of their joint liability to pay the jama in its entirety and as a whole to the zemindar.

The plaintiff sued the defendants, his co-talookdars, to recover a fourth share of the rent due to him as part proprietor for the years 1271 to 1275 (1864—1869), deducting an amount proportionate to his own talookdari share in the talook, *viz.*, 8 gundas.

The defendants pleaded, *inter alia* that the plaintiff's claim was barred by lapse of time; and that the suit being in effect a suit for a partial partition of the talook could not be entertained unless a complete partition of the talook among all the shareholders with the assignment of a separate jama to each was carried out.

It appeared that the plaintiff had previously instituted two suits in the Collector's Court against the defendants, the first on

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the 17th of April 1867 for the arrears of 1271—1273 ; and the second on the 27th of July 1869 for those of 1273—1275. Both these suits were dismissed on the 1st of May 1871 for want of jurisdiction ; and the plaintiff then brought the present suit in the Civil Court.

The Subordinate Judge held on the first point, that the plaintiff's claim was governed by the provisions of Act XIV of 1859, and that he would be in time provided he came within six years from the dismissal of his suit in the Revenue Court ; on the second point, the Judge held the suit was maintainable. But being of opinion that the plaintiff was guilty of fraud upon his co-talookdars in not making a proportionate deduction respecting his own share in the claim preferred by him in the Revenue Court, he disallowed the rents for the period during which the two former suits were pending in that Court, and simply gave him a decree for the period from 25th Magh 1273, to Choitro 1275 (February 1867 to March 1869).

The plaintiff appealed to the High Court from that portion of the Judge's order which disallowed his claim respecting the arrears of 1271—1273 ; and one of the defendant Manson appealed from the portion decreeing the plaintiff's claim.

Baboo Hem Chunder Banerjee and *Nullit Chunder Sen* for Gobindo Coomar Chowdhry.

Baboo Bhowani Churn Dutt for Manson.

Baboo Hem Chunder Banerjee.—The Judge was clearly wrong in disallowing plaintiff's claim for the period spent in the Revenue Court. The reasons assigned are purely arbitrary. The suit not being for arrears of rent within the meaning of s. 21 of Beng. Act VIII of 1869 does not come within the purview of s. 29 of that Act. It is clearly governed by the provisions of the general Limitation Act (XIV of 1859). S. 14 of Act XIV of 1859 expressly provides that the time spent by the plaintiff in the *bond fide* prosecution of his claim in any Court of Justice, which from defect of jurisdiction or

other cause should have been unable to decide upon it, shall be excluded in computing the period of limitation. The plaintiff in this case was diligently and *bonâ fide* engaged in prosecuting his claim up to May 1871, and is clearly entitled to the exclusion of the time so occupied. This is in no sense a suit for a partition of the estate or the jama, but merely a claim for what is due from the defendants, who in equity should not be allowed to defeat the plaintiff's claim upon a mere technical ground.

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Baboo Bhowani Churn Dutt.—The main object of the present suit is to obtain a declaration of the separate liability of the plaintiff in proportion to his talookdari interest. He ought for this purpose to have applied regularly 'under the provisions of Act XI of 1859 to separate the liabilities of all the shareholders. The suit is misconceived and ought to be dismissed. In the second place, the suit being clearly for arrears of rent within the meaning of s. 21 of Beng. Act VIII of 1869 is barred by s. 29. But even under the general limitation law, the claim is barred by lapse of time; no deduction ought to be allowed to the plaintiff in computing the period of limitation, inasmuch as the Judge has expressly found he was not prosecuting his claim *bonâ fide* in the Revenue Court.

Baboo Hem Chunder Banerjee was not called upon to reply.

The judgment of the Court was delivered by

PHEAR, J. (who, after stating the facts of the case, continued):—The question of limitation is not altogether a simple one. The defendants contend that the enactment of s. 29 of Beng. Act VIII of 1869 alone governs the case, and if it does, the whole of the plaintiff's claim is unquestionably barred. If, however, the general law of limitation, which is to be found in Act XIV of 1859, applies, either in conjunction with s. 29 of Beng. Act VIII of 1869, or alone, then the plaintiff may be entitled to sue for a part, or even the whole, of his claim.

The words of s. 29 of Beng. Act VIII of 1869 are identical with those of s. 32 of Act X of 1859, and it has been decided both by

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a Full Bench of this Court in the case of *Poulson v. Madhusudan Paul Chowdhry* (1), and by a judgment of the Privy Council in *Unnoda Persaud Mookerjee v. Kristo Coomar Moitro* (2), that the

(1) B. L. R. Sup. Vol., 101.

(2) PRIVY COUNCIL.

The 26th November 1872.

UNNODA PERSAUD MOOKERJEE
v. KRISTO COOMAR MOITRO.

[On Appeal from the High Court of
Judicature at Fort William in Bengal.]

*Limitation—Suit for Arrears of
Rent—Act X of 1859, s. 32—Act
XIV of 1859.*

The limitation in a suit for arrears of rent brought in the Collector's Court, under Act X of 1859, is that provided by s. 32 of that Act, and not that provided by Act XIV of 1859.

APPEAL from a decision of the High Court at Calcutta (Morgan and Seton-Karr, JJ.), dated 21st April 1865.

Mr. Leith and Mr. Doynes for the appellant.

The respondent did not appear.

The judgment of their LORDSHIPS was delivered by

SIR M. E. SMITH.—The single question to be decided in this appeal is, whether to an action for rent brought in the Collector's Court under Act X of 1859 (The Rent Act), the bar of limitation applicable to it is that provided by the 32nd section of the same Act, or that provided by Act XIV of 1859, passed six days later.

If the limitation of s. 32 of Act X is still in force, the action is barred; but if, as the appellant contends, that section has been repealed

and the limitation of Act XIV is applicable to the case, then it is not.

The 32nd section of Act X enacts, that "suits for the recovery of arrears of rent shall be instituted within three years from the last day of the Bengal year, or from the last day of the month of Jeyt of the Fualy or Willayuttee year, in which the arrears shall have become due."

By Act XIV, s. 1, cl. 8, the limitation applicable to suits for the rent of any buildings or lands is the period of three years from the time the cause of action arose.

The present suit would be barred even under Act XIV, but for the operation of cl. 14 of that Act, which provides that in computing the period of limitation prescribed by that Act, the time occupied in prosecuting an abortive suit, shall, under certain conditions, be excluded. There has been litigation, which would bring the present case within this section, and prevent the suit being barred if Act XIV is applicable to it. There is no analogous provision in Act X, and it is admitted by the appellant that if that Act governs it, the suit is barred.

Act X is not expressly and specially repealed; but the enactments of the later Act are no doubt in their terms large enough to include the limitation contained in it; for s. 1 of Act XIV enacts, that "no suit shall be maintained unless the same is instituted within the period of limitation hereinafter made applicable to a suit of that nature, any Law or Regulation to the contrary notwithstanding," and

* President SIR J. W. COLVILLE, SIR B. PEACOCK, SIR M. E. SMITH SIR R. P. COLLIER, AND SIR L. PEEL.

latter enactment applied specially to the limited class of suits which could be maintained in the Collector's Courts under the

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among the suits to which it is enacted that, "the same shall be applicable" are, "all suits for the rents of any buildings or lands (other than summary suits before the Revenue Authorities under Regulation V of 1822, of the Madras Code)." S. 18 of the same Act also enacts that "all suits to which the provisions of this Act are applicable shall be governed by this Act, and no other law of limitation, any Statute, Act, or Regulation now in force notwithstanding."

and by which all the proceedings before the Collectors were to be regulated and governed. The preamble shows an intention to deal with questions regarding the right of ryots in relation to the occupancy of lands. One of the objects was to prevent oppression. It recites that it was expedient to extend the jurisdiction of the Collectors, and to prescribe rules for the trial of the above questions as well as of suits for the recovery of arrears of rent, and s. 23 (cl. 4) enacts that "all suits for arrears of rent due on account of land either khiraji or lakhiraj, or on account of any rights of pasturage, forest-rights, fisheries, or the like," shall be cognizable by the Collectors, and shall be instituted and tried under the provisions of the Act, and shall not be cognizable by any other Court or in any other manner.

This enactment gives exclusive jurisdiction to the Collectors, and clearly indicates the intention of the Legislature to be, that the special questions which are thus made the subject of peculiar legislation, shall be tried according to the procedure established by the Act, and in no other manner.

The provision for the limitation of suits is a part of the procedure thus established.

The period prescribed by Act X, as already stated, is "three years from the last day of the Bengal year, or from the last day of the month of Jeyt, of the Fusly or Willayuttee year in which the arrears became due." A proviso is added that if the suit is for enhanced rent, not confirmed by a competent Court, the suit must be

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The question, however, arises whether the special legislation contained in Act X is not of such a special kind, that, according to a well established rule for the construction of Statutes, it should be presumed that the Legislature did not intend by the general enactment to interfere with it. The reason for this rule of construction is well expressed by Lord Hatherly, when Vice-Chancellor in *Fitzgerald v. Champneys* (a) and in terms which appear to be very applicable to the legislation their Lordships have to consider in the present appeal:—"The reason is that the Legislature having had its attention directed to a special subject, and observed all the circumstances of the case, and provided for them, does not intend, by a general enactment afterwards, to derogate from its own act, where it makes no special mention of its intention to do so."

Act X established a rent-law for the Bengal mofussil only; it was intended to form a special and complete code of procedure with regard to the trial of questions relating to rent and the occupancy of land in the mofussil,

(a) 30 L. J., Ch., 777. at p. 782

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provisions of Act X of 1859; and its application to those suits was unaffected by any provisions of the general law of limitation

brought within three months from the end of the year, as above defined, on account of which the enhanced rent is claimed. The period thus defined and prescribed, and the provision as to enhanced rent, show that these rules were framed with especial reference to the case of ryots and other tenants in the mofussil, and to their times and modes of paying rents.

Act XIV has no provision as regards enhanced rent, and it could hardly have been intended that part of the limitation, as regards the rents of ryots, should be found in one Act, and part in another.

Reading together the 23rd and 24th sections of Act X, it will be found that the Act prescribes the same period of limitation for rent of land, and of rights 'of pasturages, forest-rights, fisheries, or the like. Act XIV, by the enactment relied on as superseding this limitation, relates to rents, "of buildings, or lands" only. These words clearly would not comprehend rent of rights of pasturage, forest, and the like. It is plain also that the longer periods mentioned in Act XIV would not be applicable to suits for these rents, in consequence of the 3rd clause of that Act. Such suits would still be governed only by the limitation in Act X; and the consequence therefore of holding that the limitation as regards suits for rents of land in Act X is repealed by the later Statute, would be to establish different periods for suits for rents of land, and those for rents of pasturage and the like.

It cannot reasonably be presumed that when the Legislature, in the particular legislation, specially devised to meet the case of all these rents, had put them in the same category, it

intended by the subsequent general Act to separate and assign different periods to them. No reason can be suggested for such a separation, or for supposing that the Legislature meant that the provisions to be found in ss. 11 to 14 of Act XIV, suspending or prolonging the periods of limitation when certain disabilities exist, should extend to one set of these rents and not to the others. It should be observed that none of these provisions^s are introduced into Act X, and it may well be that the Legislature thought they were not adapted to the cases for which the simple procedure established by that Act was intended to provide.

Another point arises on a comparison of the Acts, which is material to be regarded in construing them. Act X was to come into operation at once, Act XIV only after an interval of two years; and different provisions were made in the two Acts as to suits for arrears due at the time of the passing of the Acts. It does not seem a violent presumption to suppose that the Legislature in framing the two Acts with these distinctive provisions, intended that both should have independent force.

The fact that the Acts were virtually contemporaneous appears strongly to support the presumption arising from the above considerations, viz., that it was not meant that the harmony of the system of the special Act, which had been designed for special objects, should be disturbed by the general Act.

The words "rent of any buildings or lands," which occur in Act XIV, are, no doubt, sufficiently large in themselves to comprehend all lands; and their Lordships cannot assent to

comprised in Act XIV of 1859. But so far as the present suit is concerned, Act X of 1859 has been repealed by Beng. Act VIII of

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one of the reasons given by Norman, C. J., for his judgment in the case of *Poulson v. Madhusudan Pal Chowdhry* (a), viz., that the words "rent of lands" might be construed to be confined to lands appurtenant to buildings. They think the works cannot be so limited, for Act XIV was a general law intended to have force throughout the British territories in India. But these comprehensive words will have effect and operation, without holding them to apply to the special legislation of Act X, which is confined to the Bengal mofussil.

It should be observed that although Act XIV proposes to consolidate the laws relating to the limitation of suits, it clearly was not intended to be of universal application. It is confined by s. 18 to suits "to which the provisions of the Act are applicable." The Legislature therefore contemplated some cases of limitation which would remain unaffected by the general legislation. It would certainly be an unfortunate result of the attempt to consolidate the law, if the effect of the legislation was, that as to suits for rents triable by the Collectors under Act X, the limitation of them was to be found partly in that Act and partly in Act XIV. It would seem to conform more to the spirit of the legislation so to construe the Act as to prevent this result.

The exception in Act X of summary suits before the Revenue Authorities under Regulation V of 1823, of the Madras Code, has been strongly relied on by the appellants as indi-

cating an intention not to except suits before the Collector under Act X. Undoubtedly, this exception adds to the difficulty of construction. But the Madras Regulation related to summary suits. Suits of that kind were abolished in Bengal by Act X, and a code of special procedure with special rules, including one of limitation substituted for them. It may not have occurred to the framers of Act XIV when referring to these summary suits in Madras, that it was necessary to except by express words suits of another kind regulated in their entirety by special legislation.

Difficulties have frequently been imposed on Courts of Justice in construing Statutes, arising from the apparent conflict between special and general legislation; and the rule of construction that special legislation is not repealed by general enactments, unless a clear implication of that intention can be found, was adopted in early times to meet these difficulties, and has been acted on in numerous modern instances. See *Thorpe v. Adams* (b) and *The Queen v. Champneys* (c). In the latter case, Bovill, C. J., says:—"It is a fundamental rule in the construction of Statutes, that a subsequent Statute in general terms is not to be construed to repeal a previous particular Statute, unless there are express words to indicate that such was the intention, or unless such an intention appears by necessary implication."

Their Lordships, upon a comparison of the two Statutes in question, with reference to their objects, and

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(a) B. L. R., Sup. Vol., 101; see p. 104. (b) L. R. 6, C. P., 125.

(c) L. R. 6, C. P., 384, at p. 394.

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1869, and although the Bengal Legislature has, it may be said, put s. 29 of Beng. Act VIII of 1869 in the place of s. 32 of Act X of 1859, it may be open to question, whether the relation between Act XIV of 1859 and the enactment of 1869 of the Bengal Code is precisely the same as that which Act XIV of 1859 bore to s. 32 of Act X of 1859 of the Indian Legislature. The changes of jurisdiction as to rents-suits, which was effected by Beng. Act VIII of 1869 in repealing Act X of 1859, and the omission of the framers of s. 29 of the Bengal Act to preserve by express words the operation of this section from being influenced by any of the qualifying provisions of Act XIV of 1859, introduce some difficulty in the way of arriving at a correct opinion upon this point. On the whole, however, we think that the principal reasons which weighed with the Privy Council in the judgment referred to have not been materially weakened in force by the later provincial legislation, and that the words of s. 29 of Beng. Act VIII of 1869 are intended to apply specially, and exclusively of Act XIV of 1859, to the same class of cases as those which s. 32 of Act X of 1859 applied to, although that class cannot now be defined, as it formerly could, by reference to the jurisdiction of the Court in which the cases fall to be entertained. We are of opinion that the class is limited to suit for arrear of rent simply, as "arrears of rent" are defined in s. 21 of

considering that they were virtually contemporaneous Acts, have come to the conclusion that the intention to repeal the particular law is not made distinctly to appear, either by express words or necessary implication, and, consequently, that the limitation of Act X remains in force.

They are not dealing with the question as *res integra*, for the same construction was given to the Acts by the Full Bench of the High Court of Bengal, in the case of *Poulson v. Madhusudan Pal Chowdhry* (a), already referred to, which was decided in the year 1865. It is true that this decision

preceded by, a short time only, the judgment now under appeal; but it has probably been acted upon in the numerous suits which must since have arisen in the Bengal Presidency under Act X. Unless, in this condition of things, their Lordships found that the above decision of the Full Court was manifestly wrong, they ought not to disturb it. They have not arrived at this conclusion, and it will, therefore, be their duty in the present case to advise Her Majesty to dismiss this appeal, and to affirm the judgment of the High Court.

(a) B. L. B., Sup. Vol., 101; see p. 104.

Beng. Act VIII of 1869, i.e., inasmuch as these words are the same as those of s. 20 of Act X of 1859, which defined the jurisdiction of the Collector in this respect, is limited to such suits for the recovery of arrears of rent as the Collector could have entertained under that Act.

Now it is certain that the Collector could not have tried the matter of the present suit, [because the plaintiff in the first instance preferred his claim in the Court of the Collector, and it was eventually dismissed in that Court on the ground of want of jurisdiction, and this decision was affirmed by the High Court; for this reason the plaintiff instituted the present suit in the Civil Court. It appears to us, therefore, clear, that the question of limitation in the present case is independent of s. 29 of Act VIII of 1869, and is governed only by Act XIV of 1859.

But although the present suit is not a suit for the recovery of arrears of rent within the meaning of s. 29 of Beng. Act VIII of 1869, it is certainly a suit for rent of land, and so is, we think, within the scope of cl. 8, s. 1 of Act XIV of 1859. The judgment of the Privy Council already referred to, if any authority be needed, shows that the word "land" in this section is not qualified by the immediately preceding words, and extends to all ordinary agricultural land. This section, therefore, imposes a limitation of three years for the institution of the plaintiff's suit, to be computed from the time when the cause of action arose, and the cause of action in respect of each constituent part of the claim arose when the kist which it represents became due.

S. 14 of the same Act, however, provides that, "in computing any period of limitation prescribed by this Act, the time during which the claimant, or any person under whom he claims, shall have been engaged in prosecuting a suit upon the same cause of action against the same defendant, or some person whom he represents, *bond fide* and with due diligence, in any Court of Judicature which, from defect of jurisdiction or other cause, shall have been unable to decide upon it, or shall have passed a decision which, on appeal, shall have been annulled for any such cause, including the time during which such appeal, if any has been pending, shall be excluded from such computation."

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And with regard to the plaintiff's claim of arrears of rent for the period between Asar 1271 (June-July 1865), and Chaitra 1273 (March-April 1867), he instituted a suit in the Collector's Court on the 17th April 1867, which ultimately, on the 1st of May 1871, failed for want of jurisdiction. And with regard to his claim for the period between Chaitra 1273 and 1275 (March-April 1866 and 1868), he instituted a suit in the Collector's Court on the 27th July 1869, which also failed for the same cause on the 1st May 1871. If, therefore, these suits were prosecuted *bonâ fide* and with due diligence, the plaintiff is now entitled to a period of limitation equal to seven years and half a month for his suit so far as concerns his claim to arrears of rent for the years 1271, 1272, 1273; and a period equal to four years nine months for his suit so far as concerns his claim to arrears of rent for the years 1274 and 1275.

The Subordinate Judge, for reasons which we cannot accept, refused to allow the plaintiff the benefit of s. 14 of Act XIV of 1859. It seems to us that the *bona fides* and diligence of that section have reference solely to the conduct of the suit, which failed for want of jurisdiction: And we conclude from the evidence that the plaintiff was entirely in earnest in instituting and prosecuting the suits of 1867 and 1869, and quite believed until the termination of those suits on the 1st May 1871, that the Collector's Court had jurisdiction to entertain and determine them. We also think that he prosecuted these suits with due diligence. Consequently he is, in our opinion, entitled, as regards the matter of his claim in the present suit, to the periods of limitation which have just been mentioned.

The second principal head of defence is, we think, based upon a slight misapprehension of the nature of the present suit. If the suit had been instituted by the plaintiff solely for the purpose of having determined as between himself and his co-talookdars the portion of the jama due to the zemindars which he himself ought to pay, then no doubt each of the other co-sharers in the talook would have a right, without defeating the suit, to ask that his own share of the jama should be determined at the same time, and so far as the present suit has this object in view, each of the defendants is probably entitled to make this,

request. But plainly, the defendants do not now object merely that they have not been afforded a reasonable opportunity of settling as amongst themselves their respective liabilities to contribute to the aggregate jama payable by all; they simply want to defeat the plaintiff's claim for arrears of rent against them. But this, in our judgment, they cannot do. The zemindar, by becoming a shareholder in the talook, does not lose his right to the joint responsibility of all the other shareholders for the due payment of the rent; he only becomes bound to make in his claim for rent a just and equitable allowance for that portion of it which he, as a shareholder in the talook, ought to contribute towards the common burden.

On the whole, we think that the decision of the lower Court is right so far as it goes: but that the plaintiff ought to be allowed a greater period of limitation in respect of the different parts of his claim than the Subordinate Judge has afforded him. The decree of the lower Court must be varied accordingly, and the plaintiff must have his costs of this appeal.

For the reasons above given, the appeal of the defendant, Manson, must be dismissed.

Judgment for plaintiff in both appeals.

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AMEERONMISSA KHATOON AND OTHERS (DEFENDANTS) v. ABA-DOONNISSA KHATOON AND OTHERS (PLAINTIFFS).

[On appeal from the High Court of Judicature at Fort William in Bengal.]

Mahomedan Law—Gifts—Musha or Confusion—Minority—Reg. XXVI of 1793, s. 2.

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Where there is on the part of a father or other guardian of a minor a real and *bona fide* intention to make a gift to the minor, the Mahomedan law will be satisfied without actual change of possession, and will presume the subsequent holding of the property by the father or guardian to be on behalf of the minor.

Where the subjects of a gift are definite shares in certain zemindaris, the nature of the right in which is defined and regulated by the public Acts of the British Government, so that they form for revenue purposes distinct estates, each having a separate number in the Collector's books, and each liable

* Present:—SIR J. W. COLVILLE, SIR B. PEACOCK, SIR M. E. SMITH, SIR R. P. COLLIER and SIR L. PEARL.

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to the Government only for its own assessed revenue, the proprietor collecting a definite share of the rents from the ryots, and having a right to this definite share and no more, the rule of the Mahomedan law as to *musha*, which makes the gift of undivided property invalid, does not apply.

Quere.—Whether the law relating to *musha* applies to those cases in which the owner gives all his own interest in undivided property:

A plaintiff sued to set aside certain documents which he alleged to have been forged by the defendant. At the trial of the case in the Court of first instance the only issue directed to these documents was :—"Are the three written agreements said to have been given by the plaintiff to the defendant genuine and valid deeds?" It was not contended by the plaintiff in that Court that the agreements had been obtained from him while he was a minor by undue influence, nor was that objection taken in the grounds of appeal against the judgment of the Court. *Held*, that it was too late to take the objection for the first time in the Court of Appeal.

Semle.—In respect of a transaction in which a Mahomedan, the proprietor of an estate paying revenue to Government, disposes of that estate, the period of minority is that of eighteen years, as fixed by s. 2, Regulation XXVI of 1793.

APPEAL from a decision of the High Court at Calcutta, dated 14th March 1864, reversing a decision of the Judge of Dacca, dated the 7th December 1861.

The suit in which this appeal was preferred was instituted in June 1859, in the Court of the Civil Judge of Dacca, by Wahid Ally, the husband of the respondent Abadoonnissa, against his father Abdool Ally, the husband of the appellant Ameeroonnissa and others, for the purpose of setting aside three ikrarnamas, of which the first two bore date the 29th Falgun 1259 (11th March 1853), and the third, the 16th Aghran 1263 (30th November 1856), and two maurasi pattas alleged to have been executed by the plaintiff, but which he contended had been forged by his father the defendant; and of having effect given to three hibanamas, or deeds of gift, dated respectively 14th Magh 1254 (14th January 1848), 19th Aswin 1256 (4th October 1849), and 24th Jaisti 1258 (6th June 1851), which purported to have been made in favor of the plaintiff, two of them by his father, and one by his mother; and for the recovery of certain lands and other property which these documents purported to deal with. The first hibanama purported to convey to the plaintiff certain lands appurtenant to the Kuddum Russool Durga at Noabaree, of which Abdool Ally appointed

the plaintiff mutawalli and directed that during his minority one Munshi Kolumooddeen Mahomed should be his guardian for the business of the durga.

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The defendant Abdool Ally was mutawalli or guardian of the durga or sepulchre of Kuddum Russool at Noabaree, and was otherwise possessed of considerable landed property. In 1287 B.E. (1830) he married a lady named Noorunnissa, settling on her a dower, of which a portion was paid at the time of the marriage. In satisfaction of the balance, by a registered deed dated the 29th Chaitra 1274 (April 1840), he conveyed to her certain lands. In the following year he sold to her certain other estates, and authorized her to have her name registered in the Collectorate as owner. In addition to the estates thus conveyed to her by her husband, Noorunnissa was possessed as heiress to her mother, and of her own right, of a distinct share in a zemindari named Boro Bajoo.

The plaintiff and one daughter were the only issue of this marriage. The plaintiff was born about the year 1243 (1836, A.D.)

In the years 1857 and 1858, disputes as to the possession of various lands having arisen between the plaintiff and his father in respect of leases which had been given by them to different parties, proceedings were instituted under the provisions of Act IV of 1840, and various awards were passed by the Magistrate in favor of Abdool Ally and against the plaintiff. In consequence of these awards, on the 28th of June 1859, Wahid Ally brought the present suit against his father Abdool Ally, his stepmother the present appellant, and various lessees of the estates in dispute. The plaint prayed that the ikrarnamas and maurasi pattas above mentioned, might be set aside as forged, that possession, with mesne profits, of the durga and of the properties comprised in the three deeds of gift, should be decreed to the plaintiff, and that the orders of the Magistrate in the Act IV proceedings should be reversed.

Abdool Ally in his written statement denied making the first alleged deed of gift, or that the property therein referred to was ever in the possession of Munshi Kolumooddeen, or of the plaintiff, and stated that it had always remained in his, the

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defendant's possession, being inalienable property. As to the second deed of gift he contended, firstly, that it was bad in law, because it purported to convey an undivided portion of an entire property; and, secondly, that it had not been executed *bonâ fide*, but for the purpose of diminishing his own credit, and thereby preventing him from getting into debt, and that therefore it had not been delivered to the plaintiff. As to the third deed relating to Noorunnissa's estates, the defendant pleaded as to part of these that they did not in fact belong to Noorunnissa, as the conveyance of them to her from him was merely colorable, and that the gift to the plaintiff was bad in law, as being a gift of lands which were not partitioned; and as to the other part of these lands which he admitted had belonged to Noorunnissa, he pleaded that the gift was bad for the reason last mentioned, and also because possession had not accompanied it. He relied upon the ikrarnamas as genuine, and denied all concern in the preparation of the maurasi pattas.

The defendant Ameeroonnissa also put in a written statement denying that she ever took any maurasi patta from the plaintiff, and stating that her husband held possession of the property as proprietor.

At the trial before the Zilla Judge the following issues were settled:—

“ 1. Are the hibas upon which the plaintiff grounds his claim valid documents? Has effect ever been given to them, and are they valid according to Mahomedan law?”

“ 2. Was the plaintiff ever in possession of the property in dispute previous to the Act IV decisions, and if so, what kind of possession?”

“ 3. Are the three ikrars said to have been given by the plaintiff to the defendant Abdool Ally genuine and valid deeds?”

“ 4. Is the plaintiff entitled as her heir to possession of 8 annas of the property left by his mother, Noorunnissa Khatoon?”

The suit was, except as to an undisputed portion of the plaintiff's claim, dismissed by the Judge of Dacca on the 7th December 1861. The Judge held that the plaintiff had failed to establish the execution of the disputed deed of gift, and that the other two gifts were inoperative by Mahomedan law, as

possession had not been made over to the donee. He further held that the ikrarnamas had all been executed by the plaintiff and were genuine and valid documents.

This decision was however reversed on appeal by a Division Bench (Morgan and Pundit, JJ.) of the High Court, on the 14th March 1864 (1), the Judges being of opinion that the execution of the disputed deed of gift was established, and that as the plaintiff was a minor at the time of the execution of all three deeds, the possession of his father as his guardian was a sufficient possession under the Mahomedan law to give validity to the gifts. As to the ikrarnamas the High Court were of opinion that two of them, if genuine documents, were executed by the plaintiff when he was a minor, and under the undue influence of his father exercised for his own advantage, and that therefore effect should not be given to them. With regard to the third ikrarnama which purported to be of a date subsequent to the plaintiff's coming of age, and which bore the seal of the plaintiff, but not his signature, the High Court held that it was not proved.

From this decision the defendants appealed to Her Majesty in Council.

Mr. Leith, Q.C., and Mr. Bell for the appellant, Amereoon-nissa:—The documents on which the respondents rely, though purporting to convey absolutely interests in land and other property, were not in fact intended to have that operation. They were intended to be simple benami transfers made subject to a *fata re* family settlement. They were so treated by the parties at the time they were made, for Abdool Ally continued in actual possession and receipt of the profits of the properties and in their uncontrolled management.

What was the intention of the parties is plain from the ikrara. These are genuine documents. They are not inofficious but contain such arrangements as under the circumstances might properly be made.

The Zilla Judge had held that as actual delivery or possession is required by Mahomedan law to give validity to a gift,

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the hibanamas put forward [by the respondent were invalid.

In this, perhaps, he was wrong, there being an exception under the Mahomedan law in respect to gifts by a father in favor of his minor son, and generally in the case of gifts to a minor, Macnaghten's Principles of Mahomedan Law, Ch. v., ss. 9. 10. These hibanamas however, are invalid, because they purport to give property which, admitting of division or separation, has not in fact been divided or defined. The case of *Keeruthnath Ojah v. Sumbhoo Chunder Roy* (1) is opposed to the cases cited by the Judges of the High Court to show that there could be no further severance of the estate. The rule of the Mahomedan law on the subject of *musha* or confusion will be found in Macnaghten's Principles, Ch. v., s. 6. In the present case, none of the individual proprietors of the estates conveyed could point to any part and say it was his. [Sir L. PEEL.—Could not a Mahomedan father give his son railway shares ?] That is an argument *ab inconvenienti*. He could pass them to his son by a deed showing consideration. [Sir L. PEEL.—The father being by Mahomedan law the guardian of his son, was he not bound to clothe the son with everything needed to perfect the gift ? Failing to do so, can he take advantage of a neglect of his duty ?] By Mahomedan law a gift by a father to his son may be revoked, since the father has power over the son's property. Abdool Ally exercised this right of revocation by executing a wukfnama. Sir M. SMITH.—The High Court say that, failing on the ikrarnamas, it is too late for you to say now, I revoke the gift. Your case is on the ikrarnamas. The effect of the wukfnama is not in issue.] Although by Mahomedan law a gift cannot be revoked where the thing given has been alienated (Macnaghten's principles, Ch. v., s. 13), assuming that Wahid Ally has given part of what he received from his father to his wife for dower, that will only affect Abdool's right to recover *pro tanto* ; Abdool cannot get back that part of his gift which has been given in dower.

The alleged hibanama of the 14th Magh 1254 was improperly admitted as evidence by the High Court. The original document was not put in, and the conditions provided

(1) S. D. A., 1862, 550.

by cl. 5, s. 2, Regulation XX of 1812, for admitting copies, were not complied with.

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• Mr. T. H. Cowie, Q.C., and Mr. Doyne for the respondent, Abadoonnissa :—We must show that the hibas are more than a mere benami transaction. For this purpose only we rely on the ikrars. These point to a property in Wahid Ally. If he had no property under the hibas there was no occasion for the ikrars. It is inconsistent to build on the ikrars, and at the same time to speak of the hibas as mere benami transactions. The ikrars imply by their terms previous valid gifts.

It is clear that by the Mahomedan law the hibas were not invalid by reason of their not having been followed by actual delivery or seisin. Property given by a father to his minor child, is expressly excepted from the general rule which requires relinquishment by the donor, Macnaghten's Principles of Mahomedan Law, Ch. v, s. 9. The property which Wahid Ally received from his mother is governed by s. 10 of the same chapter.

Nor are the hibas invalid by reason of their conveying an undivided share. The Mahomedan doctrine of *musha* or confusion is not applicable here. Case 13, in the 4th Chapter of Macnaghten which treats of (precedents of gifts,) applies where the donor gives an undefined share of what is his own, but not when he gives his whole interest in what he possesses in common with others. The Hedaya, Bk. xxx, Ch. i., Vol., iii, p. 293, is not inconsistent with the gifts in the present case. Abdool had a defined interest in the lands he gave. There was a separation of interest and rights, though not perfected by actual partition; this amounts to a separate ownership, see Lord Westbury's judgment in the case of *Appovier v. Rama Subba Aiyar* (1).

Another point is whether Abdool Ally as trustee to the Kuddum Russool Durga could transfer his rights. This objection only affects the property conveyed by the first hiba. It is an objection which might perhaps be taken by the cestui

(1) 11 Moore's L. A., 75.

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que trust, but cannot be taken by Abdool who makes the transfer. The trust was continued in the family. [Sir M. SMITH.—Of course, there is a probability that the child was only put in nominally.]

We rely on the minority of Wahid Ally at the time when the ikrars are said to have been made. [Sir M. SMITH.—You have laid no ground for an issue as to whether you were of age.] We submit we have. Our objection was, not only to the genuineness, the factum of these documents, but also to their validity. We say in effect that if made by us, still they were not valid, because we were minors when we made them. Unders. 2, Regulation XXVI of 1793, the minority of a Mahomedan proprietor of a revenue-paying estate is declared to extend to the end of the eighteenth year. Wahid Ally was born in 1836, and consequently was not of full age till 1854. Only one of the ikrars is of a subsequent date, and that one is not signed by Wahid Ally. Moreover, it purports to have been made at a time when he had quarrelled with his father.

Mr. Leith, Q.C., in reply :—Minority is limited to the expiration of the fifteenth year, both as to Hindus and Mahomedans. The extension of the period of minority to the end of the eighteenth year under s. 2, Regulation XXVI of 1793, only applies to the cases contemplated by the Regulation itself, which is to be read in connexion with Regulation X of the same year. For the purposes of these laws, a Mahomedan is to be considered a minor till the end of his eighteenth year ; but not for other purposes, *Cally Churn Mullick v. Bhuggobutty Churn Mullick* (1); and see *In the Goods of Ganga Prasad Gossain* (2). We contend, moreover, that Wahid Ally was born not later than 1831, and was of full age in 1846, or, if Regulation XXVI of 1793 applies, in 1849. Even assuming the date of birth alleged by the respondent to be correct, and that the period of minority is eighteen years, Wahid Ally was of age before the third ikrar was made. There is no evidence to show that he and his father were on bad terms when that ikrar was made. The High Court was wrong in its finding on that point.

(1) 10 B. L. R., 231.

(2) 5 B. L. R., 80.

Their LORDSHIPS' judgment was delivered by

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Sir MONTAGUE E. SMITH.—This suit was brought in the Civil Court of Dacca by Moulvie Wahid Ally against his father, Moulvie Abdool Ally, in his own right, and as the heir of his deceased wife, Eftekhurunnissa, and as the husband of another wife, Ameeroonnissa, to set aside three ikrarnamas, or agreements, on the allegation that they were forged. These ikrars, if genuine, modified the operation of three hibanamas, or deeds of gift, two purporting to be executed by his father, and one by his mother Noorunnissa containing ostensibly absolute gifts to Wahid Ally of various properties of considerable value. The plaint also prayed that Wahid Ally might be put into possession of these properties, and that the decree of the Magistrate in a suit under Act IV of 1840, maintaining his father in possession, might be set aside. Mr. Barry and others claiming under pattas from the father, were also made defendants. Their title must stand or fall with Abdool Ally's; and they did not appear on the hearing of this appeal.

The questions in the suit relate to the genuineness and validity of the three hibanamas and the three ikrars. Each of them was on some ground impeached.

The Judge of Dacca dismissed the suit (except as to an 8-anna share of some property of the plaintiff's mother Noorunnissa, which it was admitted he was entitled to), holding that the first alleged hibanama of the father was not proved, and that the second and third, from the father and mother, respectively, were invalid by Mahomedan law, there being, as he found, no delivery and acceptance of the gifts, or change of possession. He also held that the ikrars were genuine and valid.

The High Court reversed this decree, and the grounds and nature of their own decree, which is the subject of the present appeal, are thus stated at the conclusion of their judgment. "Our decree will proceed on the basis of the validity of the three deeds of gift, and the invalidity of the later documents (the ikrars). We shall declare that Moulvie Wahid Ally was in his lifetime, and that those who are now by law his heirs and

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representatives, are entitled to a decree for setting aside the documents relied upon by the respondents, and for the recovery of the property sued for."

Wahid Ally died before the decree appealed from, and the father subsequently. The parties to this appeal are their respective representatives.

It appears that at the date of the alleged hibanamas Abdool Ally had two wives, Noorunnissa, the mother of Wahid Ally, and Eftekhurunnissa. Wahid was his only son, and he had one, or at most, two daughters. Abdool afterwards married a third wife, Ameeroonnissa, and the third ikrar purports to be made on the occasion of this marriage.

The first hibanama in order of time is dated the 14th Magh 1254 (26th January 1848,) and purports to convey, by way of gift from the father, some lakhiraj lands charged with religious trusts "belonging to the Kuddum Russol Durga at Noabaree, and to appoint his son mutawalli of the durga in his place. The document also contains an appointment by the father of Munshi Kolumooddeen Mahomed to be the guardian of his son for the business of the durga during his minority. The original of this deed was not produced; and their Lordships, during the argument, declared their opinion that its non-production was not sufficiently accounted for to allow of secondary evidence being given of its contents. It appeared upon the plaintiff's evidence that the original deed had been delivered to the guardian Munshi Kolumooddeen, but this person was not called as a witness, nor was his absence explained. It is to be observed that, although the document tendered as evidence, viz., what purported to be a copy of the deed from the registry, showed that the instrument, if really executed, was signed by numerous subscribing witnesses, none of them were called to prove its existence and execution. Supposing, therefore, that secondary evidence had been admissible, neither of the two conditions required to make the copy statutory evidence of the deed by virtue of Regulation XX of 1812, s. 2, cl. 5, was complied with. It was not shown that the original was "lost, destroyed, or not forthcoming," that is to say, its non-production was not satisfactorily accounted for, nor was there any proof by

any of "the subscribing witnesses" that the original had been duly executed. No doubt, although the statutory proof failed, other secondary evidence might have been given of the contents if the non-production had been duly accounted for. It was suggested that the deed may have remained with the father, but this suggestion is opposed to the evidence; and further, the custody of the father would not be, according to the supposed terms of the deed, the proper custody. In their Lordships' opinion, therefore, no sufficient foundation was laid for the admission of secondary evidence. Objections made with the view of excluding evidence are not received with much favor at this Board, but it is sometimes necessary for the right decision of the merits of the controversy between the parties to give effect to them. In the present case the surrounding circumstances raised no presumption of the existence of the deed, and the question of the custody bore materially on the issue to be determined.

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The execution of the two other hibanamas by Abdool Ally and Noorunnissa respectively is not denied. The first of them is dated 19th Aswin 1256 (4th October 1849), and purports to be a gift from Abdool Ally to his son of certain jama lands, viz. his 10-anna share of the zemindari of Noroollapore, and shares of other zemindaris. This deed, which recites that Abdool Ally had only one son, Wahid, and a daughter Sreemutty Fakheerunnissa, who was well provided for by her husband, that he had already bestowed some of his property on his wife, Noorunnissa, and that he wished to prevent quarrels at his death and to enable his son to live well, contains an absolute and present gift from the father to the son of the above-mentioned properties.

The deed from the mother, Noorunnissa, is dated 24th Jaisti 1258 (6th June 1851;) and purports to be a present and absolute gift to her son of certain shares of the zemindari of Pergunna Boro Bajoo and of other zemindaris. Some of these properties originally belonged to Noorunnissa in her own right, and others had been transferred to her by her husband. The deed states that the son being a minor, the father as his guardian, had acknowledged the gift.

These two hibanamas were duly registered, but no mutation of names was made.

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It has been found by the High Court that Wahid became of full age, viz., eighteen, in 1261; consequently, at the date of the hibanama from the father he was a child only ten or eleven years old.

The Courts below substantially agree in their conclusions of fact upon the evidence with regard to the possession and management of the properties. They both find that although all proceedings relating to the estate were subsequently to the hibas in the son's name, the father remained in actual possession and receipt of the profits of the properties, and in the uncontrolled management of them. The Zilla Judge was of opinion, on these facts, that the transfers to the son were "purely nominal," and that the father did not intend that any property should pass by them, or at least whilst he lived; and he further held that the gifts were invalid by Mahomedan law for want of acceptance and seisin by the donee. The High Court, however, came to the conclusion that the transfers were not colorable, but intended to operate as real gifts. They also held that "when the guardian of a minor is himself the donor, and in possession of the property, no formal delivery and seisin is required." citing in support of this exception to the general law Macnaghten's Principles of Mahomedan Law, Ch. v, ss. 9 & 10.

It was not denied by the learned Counsel for the appellant, that the High Court had on this last point taken a correct view of the law; nor do their Lordships doubt that, where there is on the part of a father, or other guardian, a real and *bond fide* intention to make a gift, the law will be satisfied without change of possession, and will presume the subsequent holding of the property to be on behalf of the minor.

It was, however, strongly insisted by the appellant's Counsel that the Zilla Judge was correct in considering that the transfers were colorable, and only with the view of making the son the ostensible owner; or, if not purely benami, that they were not intended to operate exclusively for the son's benefit, but were made subject to a future family settlement. It is enough for their Lordships in this place to say there are circumstances in the case which favor this contention, at least as regards the

transfer from the father, but they do not think it necessary to go at large into this question; for, having come to the conclusion, for reasons to be hereafter stated, that the three ikrars alleged to be executed by the son are genuine documents, they think the rights of the parties must be determined on the basis of the combined operation of the hibas and ikrars. It is clear also that the father, who set up in his defence to this suit these ikrars as valid instruments, cannot now be allowed to aver that the hibas to which they relate were intended to have no operation and effect.

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A legal objection to the validity of these gifts; was made in the High Court on the ground that the gift of *musha*, or an undivided part in property capable of partition, was by Mahomedan law, invalid. This point appears to have been taken for the first time in the High Court, and was argued at this bar. That a rule of this kind does exist in Mahomedan law with regard to some subjects of gift is plain. The Hedaya gives the two reasons on which it is founded: first, that complete seisin being a necessary condition in cases of gift, and this being impracticable with respect to an indefinite part of a divisible thing, the condition cannot be performed; and, secondly, because it would throw a burden on the donor he had not engaged for, viz., to make a division; see Bk. xxx, Ch. i. Vol. iii, p. 293. Instances are given by text writers of undivided things which cannot be given, such as fruit unplucked from the tree and crops unsevered from the land. It is obvious that with regard to things of this nature separate possession cannot be given in their undivided estate, and confusion might thus be created between donor and donee which the law will not allow.

In the present case the subjects of the gift are definite shares in certain *semindaris*, the nature of the right in them being defined and regulated by the public Acts of the British Government. The High Court, after stating that the shares "were for revenue purposes distinct estates, each having a separate number in the Collector's books and each being liable to the Government only for its own separately assessed revenue," and further, that the proprietor collected a definite share of the rents from the *ryots*, and had a right to this definite share and

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no more, held that the rule of the Mahomedan law did not apply to property of this description.

In their Lordships' opinion this view of the High Court is correct. The principle of the rule and the reasons on which it is founded do not in their judgment apply to property of the peculiar description of these definite shares in zemindaris, which are in their nature separate estates, with separate and defined rents. It was insisted by Mr. Leith that the land itself being undivided and the owners of the shares entitled to require partition of it, the property remained *musha*. But although this right may exist, the shares in zemindaris appear to their Lordships to be, from the special legislation relating to them, in themselves and before any partition of the land, definite estates, capable of distinct enjoyment by perception of the separate and defined rents belonging to them, and therefore not falling within the principle and reason of the law relating to *musha*. Mr. Cowie, in his argument, contended that the rule only applied to cases where the donor himself retained some share of the property, and not to those where the owner gave all his own interest in undivided shares to the donee. The authorities on Mahomedan law do not seem to be agreed on this point; and after the opinion they have just expressed, their Lordships need not enter upon the consideration of it. Indeed, but for the great practical importance of the question they would have thought it unnecessary to express their opinion on the subject-matter of the gift, since if the *hibas* are to be construed, as they think they should be, by the light reflected upon them by the *ikrars*, absolute and pure gifts of the property were not intended; and therefore the principles of law governing such gifts are not applicable to the transaction.

(His Lordship then proceeded to state the contents of the first and second *ikrars*, and continued):—

The High Court do not apparently dissent from the finding of the Zilla Judge that these *ikrars* were executed by Wahid. They say:—"We should very reluctantly interfere with the finding of the lower Court that these *ikrars* are genuine. They were registered when made. It is not probable they remained unknown to the plaintiff until the year 1864, as we understand

him in effect to allege in his plaint." But they declined to give effect to them on the grounds, apparently, that the son was a minor, and that they were obtained by undue influence.

It is to be observed that neither the plaint nor the issues distinctly raise these points. The plaint alleges that the ikrars were forged, and the only issue directed to these instruments is in the following terms:—"Are the three ikrars said to have been given by the plaintiff to the defendant genuine and valid deeds?" Granting that the objection that the ikrars were obtained by undue influence might, if the previous proceedings had raised it, be held to be comprehended in the word "valid" in the issue (although their Lordships think such an issue ought always to be raised in a more pointed form), the question does not seem to have been in fact raised before the Zilla Judge, nor was it taken in the grounds of appeal against his judgment. In their Lordships' opinion, therefore, it was too late to set up this defence for the first time before the High Court, especially as the evidence does not seem to have been directed to it, which would certainly have been the case if the parties had originally intended to make it an issue in the cause.

The disability of Wahid Ally arising from his being a minor when the first two ikrars were given depends on the question whether his minority is in this case to be determined by the Regulations of 1793. As regards the fact, it was admitted by the respondent's Counsel that Wahid, when he made these ikrars, was fifteen, the age at which, by the general Mahomedan law, he would have been competent to act for himself; but they denied that he was then eighteen, and their Lordships are satisfied that the High Court were right in their conclusion of fact from the evidence that he did not reach eighteen (the age fixed for the majority of Mahomedan proprietors of estates paying revenue to Government by Regulation XXVI of 1793, s. 2), until 1261, which was subsequent to the date of the two ikrars.

If it had been necessary for their Lordships to determine whether the period of minority was governed by this Regulation, they would be strongly disposed to hold that it was. In dealing with these ikrars, Wahid must be assumed to be the

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proprietor of the revenue-paying estates referred to in them ; and inasmuch as they contain dispositions of such estates, the period of his minority, at least for this purpose, would seem to be within the policy and terms of the Regulation and governed by it. But this point becomes immaterial, since their Lordships are of opinion upon the evidence that the Zilla Judge was right in finding that the third ikrar, which refers to the two earlier ones, and in substance confirms them, is a genuine instrument.

It is not denied that this ikrar, if genuine, was executed after Wahid was of the full age of eighteen, and the most disputed, and obviously the most important question of fact in the cause is whether it is genuine, or was, as Wahid alleges, forged by his father.

(His Lordship, after going into the evidence and finding the ikrar genuine, continued) :—

The High Court assumes that the father really intended to denude himself of his property and to make an absolute gift of it to his son, although he had two wives living, and probably contemplated marrying, as he afterwards did, a third ; and on this assumption they regard the arrangements of the last ikrar to be improbable.

Their Lordships, however, in considering the probability of its execution, are disposed to adopt the opinion of the Zilla Judge that an absolute gift was not intended, and that the transaction was either purely benami, or, more probably, to be followed by a family settlement. In this view of the case the improbabilities relied on by the High Court vanish, and the direct evidence of the execution of the instrument ought to prevail.

The result of establishing the third ikrar will be to confirm and give effect to the two former ones, which must be construed with it. The rights of the parties ought, therefore, in their Lordships' opinion, to be governed by the provisions contained in the hibas of the 19th Aswin 1256 and the 12th Jaisti 1258, and in the three ikrars, read and construed as a whole ; and may be declared and enforced, if necessary, in a suit properly framed for that purpose.

The form of the present suit does not allow of these rights being so declared in it. The only prayer in the plaint is to have the ikrars set aside as fabricated, and the plaintiff put into possession of the properties claimed with mesne profits. Their Lordships being of opinion that the ikrars are genuine, the prayer to set them aside cannot, of course, be granted, nor can the father's possession be treated as wrongful, so as to justify the claim of the son to remove him from it. The ikrars clearly provided that the father should have the possession and control of the property during his life; and any rights, therefore, which others may have under them to any share of the profits accruing in his lifetime could only be enforced in a suit charging him in the character of manager. The present suit, which treats him as a trespasser liable to mesne profits, cannot be sustained.

For these reasons their Lordships will humbly advise Her Majesty that the decree of the High Court ought to be reversed, and that of the Zilla Judge, which dismissed the suit except as to 8-anna share of the mother Noorunnissa's property, affirmed.

The respondents must pay the costs of this appeal.

Appeal allowed.

Agent for the appellant: Mr. T. L. Wilson.

Agents for the respondent: Messrs. Lawford and Waterhouse.

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OTHERS (FIVE OF THE DEFENDANTS) v DORASINGA TEVAR, *alias*
GOWRY VALLABA TEVAR (PLAINTIFF).

P. C.*
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Feb. 6, 9, &
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[On Appeal from the High Court of Judicature at Madras.]

Declaratory Decree—Act VIII of 1859, s. 15—Consequential Relief.

The words of s. 15, Act VIII of 1859, must be construed upon the principles and by the light of the decisions of the English Courts of Equity upon the 50th section of 15 and 16 Vict., c. 86, which is in similar terms.

The effect of these decisions, taken in conjunction with the decisions of the Privy Council, in construing the provisions of the Indian Act, is, that a

* *Present*:—SIR J. W. COLVILE, SIR B. PROCOCK, SIR. M. E. SMITH, AND
SIR R. P. COLLIER.

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declaratory decree is not to be made unless there is a right on the part of the plaintiff to consequential relief, which, although not asked for, [might, if asked for, have been given, or unless the declaration of right may be made the foundation of relief to be had in another Court.

The Plaintiff, purporting to be the next heir, brought a suit against the life-tenant of a zemindari, and made another claimant to the succession to the zemindari a defendant in the suit. The plaintiff prayed for a decree declaratory of the plaintiff's right to succeed on the death of the zemindar, and made allegations of Waste, in respect of which he asked relief. *Held*, that even if the plaintiff had proved the alleged acts of waste, which he had not done, there was not a right to consequential relief which would entitle him to a declaratory decree.

APPEAL from a decree of the High Court of Madras, dated the 27th October 1871, affirming a decree of the Civil Court of Madura, dated the 23rd February 1870.

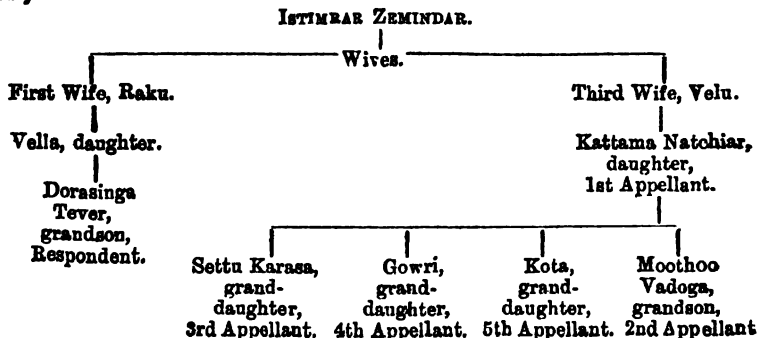
The suit in which the above decrees were made was instituted on the 8th March 1869, by the respondent, as plaintiff, against the appellants and two other persons as defendants. The suit related to the succession to the zemindari of Shivagunga, which had, under an order of Her Majesty in Council made in pursuance of a judgment of the Judicial Committee (1), been awarded to Kattama Natchiar, the first appellant in the present appeal.

In the plaint the subject-matter of the plaintiff's claim was stated to be :—

1. "To recover the zemindari of Shivagunga, as the eldest surviving male heir of Gowry Vallaba, the istimrar zemindar" (2).

(1) See 9 Moore's I. A., 539.

(2) The relationship of the parties to the istimrar zemindar, and to one another may be shewn thus :—



2. "If this should fail, to have a declaratory decree passed establishing his right to succeed to the said zemindari as next heir after the death of the first defendant."

He also claimed maintenance, apartments in the palace, management of the pagodas, &c., attached to the zemindari, "and such further or other relief as the nature of the case would admit of."

The 15th paragraph of the plaint was as follows :—

"The zemindari is impartible and capable of enjoyment by only one member of the family at a time, and the plaintiff as the eldest surviving grandson (by a daughter) of the said istimrar zemindar, has a vested right to the said zemindari, and is entitled to the succession, either now, or after the death of the first defendant, according to Hindu law and the custom which governs the succession to this zemindari."

The plaint further alleged that the first appellant had improperly leased out a part of the zemindari and alienated other parts, had pledged the state jewels, had incurred debts so as to impair the permanent income of the zemindari, and had combined with the other appellants to defraud the respondent of his right to the said zemindari; that the third, fourth, and fifth appellants had executed an assignment to their brother, the second appellant, of their pretended interest in the zemindari arising on their mother's (the first appellant's) death; and that the first appellant had executed a power of attorney to the father-in-law of the second appellant, authorizing him to establish the second appellant's right of succession, and to exercise other powers prejudicial to the respondent's interest in the said zemindari.

Subsequently, on the petition of the plaintiff, the first paragraph, and so much of the fifteenth paragraph of the plaint as sought for immediate possession of the zemindari, were struck out, and written statements having been filed by the defendants, the following issues were settled by the Court :—

"1. Whether or not, according to Hindu law the plaintiff is entitled to succeed to the zemindari of Shivagunga, at the death of the present Ranees ?

"2. Whether or not the plaintiff is entitled to succeed to the said zemindari at the death of the Ranees, by virtue of any peculiar custom which obtains in that zemindari ?

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" 3. Whether or not the plaintiff is estopped by this being *res judicata* from setting up any peculiar custom ?

" 4. Whether or not the plaintiff is immediately entitled to the maintenance claimed, or what maintenance, as such or to apartments in the palace, and what apartments ?

" 5. Whether or not the plaintiff's claim to maintenance and apartments is barred by the Law of Limitation ?

" 6. Whether or not the plaintiff is entitled to the immediate management of the devasthanams and chuttrams in the zemindari, and to the honors connected with the said management ?

" 7. Whether this is a suit in which a declaratory decree can be given at all ?"

The plaintiff subsequently applied by petition that an issue might be recorded as to whether the first defendant had not, as alleged, improperly alienated the zemindari, or any part thereof, or pledged the state jewels, or injuriously affected the permanent interests of the zemindari ; but this application was rejected by the Judge. No appeal was presented against the order rejecting the application, and the case coming on for hearing on the 23rd February 1870, the Court ordered and decreed " that, as between plaintiff and second defendant, plaintiff be declared the next in succession to the Shivagunga zemindari ; that the plaintiff's claim to maintenance and apartments be dismissed, and that he pay so much of his own costs as may be found due thereon, and those of the sixth and seventh defendants, and that the first defendant shall bear the remainder."

No appeal was brought by the plaintiff against that part of the Judge's decision which dismissed the claim for maintenance and apartments. But an appeal was preferred by the defendants to the High Court of Madras against so much of that decision as declared the plaintiff to be entitled to succeed to the zemindari on the death of the first defendant. Their objection was two-fold : first, that the case was one in which a declaratory decree could not be made ; second, that, by the Hindu law, the plaintiff was not entitled to the succession.

The decision of the Civil Judge was affirmed on both of these issues by the High Court of Madras (Scotland, C.J., and Holloway J.) (1).

(1) 6 Mad. H. C. Rep., 310.

With reference to the first objection, the Judges of the High Court were of opinion that the rule of the Equity Courts in England, which restricts their power of making declaratory orders to those cases only in which relief might be given if asked, was not applicable to the Courts in India.

From this decision the defendants appealed to Her Majesty in Council upon the same grounds on which they had objected to the decree of the Madura Civil Court.

On the case coming on for hearing, their Lordships intimated their desire that the question as to the competency of the Courts below to pass a declaratory order in the case might be argued first, since if that were decided for the appellants, it would be unnecessary to enter on the questions of law involved in the claim to the succession.

Mr. Leith, Q.C., and Mr. Norton (Mr. F. Bowring with them), for the appellants.—The respondent's claim, in so far as it was a claim for relief, was rejected by the Court of first instance. No cross appeal has been brought by the respondent against the orders of that Court, which rejected his claim for relief. No relief therefore can now be given, and consequently no declaration of right can be made. The title of the first appellant for her life at least is not disputed, and no case has been made out of alienation, or waste, such as would justify proceedings at the instance of a reversionary heir to restrain a present wrong. [SIR B. PEACOCK.—The respondent is only presumptive heir; he cannot ask to be declared an heir presumptive. SIR J. COLVILLE.—There is nothing but a declaration now sought. There was nothing shewn on which the Judge could have granted relief. Mr. Dwyer.—The Judge did not go into that branch of the case. He refused to frame an issue as to the alleged alienations and waste.] The Court had no power to pass a declaratory decree under such circumstances. S. 15, Act VIII of 1859, is word for word the same as s. 50 of 15 and 16 Vict., c. 86, which it is settled gives the English Courts of Equity no power to make a mere declaratory decree in the case of a future right, much less of a right which is both future and contingent, or where no present relief is

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sought or can be given. The same principles which the Court of Chancery has applied in construing the English Statute must be held to govern the construction of the Indian enactment; see *Baijoynath Ochatteejee v. Lakhi Mani Debi* (1), *Mussamut Suraj Bansi Kunwar v. Mahipat Singh* (2), and *Thakoor Deen Tewarry v. Nawab Syed Ali Hossein Khan* (3).

As to the argument that since in India evidence cannot be taken till after a suit has been instituted, it might be lost unless a suit for a declaration of a future right were allowed; see *Lord Dursley v. Fitzhardinge* (4) and *Allan v. Allan* (5). There was nothing, however, in the case to show that there was any danger of losing testimony. The real issue was entirely one of law.

Numerous decisions of the English Courts show the interpretation to be given to the provisions of the English Statute. In *Roos v. Lord Kensington* (6), it was held that these did not apply unless the plaintiff would have been entitled, had he asked it, to consequential relief. A prospective declaration against a claim which might never arise was refused in *Jackson v. Turnley* (7); see also *Lady Langdale v. Briggs* (8) and *Garlick v. Lawson* (9). In this last case, Wood, V.-C., refused to make a declaratory decree as to the interests of parties entitled in reversion on a life-estate.

In three cases recently decided by the Privy Council the same interpretation has been put on the terms of the Indian Act,—namely the cases of *Sreenarain Mitter v. Sreemutty Kishen Soondery Dasse* (10), *Sadut Ali Khan v. Khajeh Abdool Gunny* (11), and *Raja Nilmoney Singh Deo Bahadoor v. Kales Churn Bhattacharjee* (12).

The Bengal High Court has followed the English rulings, and has recognized the impropriety and injustice of deciding questions which may never arise; see *Musst, Pranputtee Koer v.*

(1) 5 B. L. R., 514, note.

(7) 1 Drew., 617.

(2) 7 B. L. R., 669.

(8) 8 De G. M. & G., 391.

(3) 8 W. R., 341; and on appeal to the Privy Council, 13 B. L. R., 427.

(9) 10 Hare, App. I., xiv.

(4) 6 Ves., 251.

(10) 11 B. L. R., 171.

(5) 15 Ves., 130.

(11) 11 B. L. R., 203.

(6) 2 K. & J., 753.

(12) 14 B. L. R., 332.

Lalla Futteh Bahadoor Singh (1), *Pureejan Khatoon v. Bykunt Ohunder Chuckerbutty* (2), *Baboo Motee Lal v. Ranees, Wife of Maharajah Bhoop Singh Bahadoor* (3), *Kenaram Chuckerbutty v. Dinonath Panda* (4), *Rani Anund Koomaree v. Government* (5), and *Beharry Lal Mohurwar v. Madho Lall Shir Gyawal* (6). [SIR J. COLVILLE.—In the case of *Musst. Pranputtee Koer* (1), reference is made to the case of *Sreemutty Rajcoomaree Dossee v. Nobocoomar Mullick* (7); that case was decided by the late Supreme Court under s. 29, Act VI of 1854, which was identical in its terms with s. 15, Act VIII of 1859.] The Bombay High Court also has expressly followed the English decision; see *Beattie v. Jetha Dungarsi* (8), *Babaji Jivaji v. Bhagirthibai* (9), *Yesaji Apaji Patil v. Yesaji Mhaloji* (10). [SIR B. PEACOCK.—The High Courts of the three Presidencies in their original jurisdiction are bound to administer the same law as the late Supreme Courts, and to follow the decisions of the English Courts of Chancery; can these Courts decide otherwise or administer different law in dealing with appeals from the mofussil?] The Madras High Court, alone of the High Courts in India, has interpreted the law differently from the English Courts of Equity, and has laid down the rule that future and contingent rights may be declared at the discretion of the Courts, and that declarations may be made where no consequential relief can be given. The course of the decisions of the Madras Court have not, however, been uniform, and in the earlier judgments true principles are recognized.

The following decisions of the Madras High Court were referred to :—

Periya Gaundan v. Tirumala Gaundan (11), *Rassonada Rayar v. Sitharama Pillai* (12), *Padagalingam Pillay v. Shanmugham Pillay* (13), *Tirumalathammal v. Venkatarama-*

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- (1) 2 Hay, 608.
- (2) 7 W. R., 96.
- (3) 8 W. R., 64.
- (4) 9 W. R., 325.
- (5) 9 B. L. R., 16.
- (6) 13 B. L. R., 222.
- (7) 1 Boulnois, 137.

- (8) 5 Bom. H. C. Rep., O. C., 152
- (9) 6 Bom. H. C. Rep., A. C., 70.
- (10) 8 Bom. H. C. Rep., A. C., 35.
- (11) 1 Mad. H. C. Rep., 206.
- (12) 2 Mad. H. C. Rep., 171.
- (13) *Id.* 333.

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naayan (1), *Karyan v. Perria Sidden* (2), *K. Sitaramaiya v. K. Vardhanamma* (3).

In the present case the Chief Justice rests the declaratory decree solely on the prejudice to the respondent's title which the power of attorney given by the first appellant is likely to cause. But the alleged wrongful act of the first appellant in executing the power of attorney could not give the Court a power it would not otherwise have had of declaring a right of the respondent against a third person not a party to such act. Holloway, J., supported the declaratory decree on the ground of obscurity to the title by lapse of time, doubtfulness of the point of law, and that there was no admission of the pedigree until the case came to be tried. He said he preferred to rest the decision rather on "the quieting of a doubtful title," than on the fact of alienations having been made. As to the alienations, they were denied and were not in issue. As regards the pedigree, it was not only admitted when the case came to be tried, but was relied on by the first appellant as a part of her case. The difficulty or doubtfulness of a point of law which may never arise can give no present jurisdiction to make a declaratory decree. As regards "quieting a doubtful title," it was to be observed that the respondent never has had possession, and might die without ever becoming entitled. His doubtful title is therefore not so much "quieted," as declared in a contingency which may never happen, and that at the expense of the first appellant whose title is undoubted, but who has been ordered to pay the costs of these premature and possibly nugatory proceedings.

There is great hardship to the first appellant in the present declaratory decree. Her title is undisputed, and no person can possibly have any right who does not survive her. The Bengal decisions, which allow a reversionary heir to sue in cases of fraud and waste on the part of a Hindu widow in possession of her husband's estate, are clear to the effect that he is to have no declaration of right. He may perhaps sue to have it declared that a conveyance by the widow is not binding beyond her

(1) 2 Mad. H. C. Rep., 378.

(2) 6 Mad. H. C. Rep., 307.

(3) 9 Mad. Jur., 374.

lifetime.—*Baboo Jodoo Nundun Pershad Sing v. Mussamut Nundo Koroe* (1), *Musst. Ram Bunsee Koonwur v. Musst. Moeshur Koonwur* (2), *Nobin Chunder Chuckerbutty v. Guru Persad Doss* (3), *Brinda Dabee Chowdhraiz v. Peares Lall Chowdhry* (4). [SIR B. PEACOCK, with reference to waste, cited *Vyavastha Darpana*, 2nd ed., p. 59. SIR M. SMITH.—Here there is nothing which the plaintiff can ask to be set aside. The power of attorney cannot be construed into an instrument of title. It is not sought to set it aside.]

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Mr. Doyne and Mr. J. D. Mayne for the respondent.—The Civil Courts in India have a discretionary power in all cases to make declaratory decrees, and in this instance have properly exercised it. This discretionary power was possessed by the Courts in the mofussil before the Code of Civil Procedure was passed, and has not been taken away by the provisions of the Code. [SIR J. COLVILLE.—Had the Indian Courts any power before the Code was passed of making orders merely declaratory? SIR M. SMITH.—The object of the corresponding clause in the English Statute was to extend the jurisdiction of the Court of Chancery.] S. 1, Act VIII of 1859, shows what suits are excluded from the jurisdiction of the Courts. There is no other limitation. The Courts in India, being at once Courts of law and equity, have wider powers than the English Equity Courts. They are not tied down to the declaration of right in those cases only in which equitable relief might be given. They have a discretionary power to declare title, wherever there is a title in dispute, and this discretionary power does not require a statutory basis. It is a mistake, therefore, to limit the jurisdiction of the Indian Courts on the authority of the English decisions. The Civil Judge of Madura was right in his remark, that if it had not been for the English cases there would have been no question as to how the 15th section of the Civil Procedure Code should be interpreted.

The Courts in India have always asserted the right to make

(1) 1 W. R., 219.

(2) *Id.*, 338.

(3) B. L. R., Sup. Vol., 1008.

(4) 9 W. R., 460.

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declaratory orders; see *Musst. Pramputtee Koer v. Lalla Futteh Bahadoor Singh* (1), *Gobindmani Dasi v. Shamlal Bysack* (2), *Baboo Motee Lal v. Ranees, Wife of Maharaja Bhoop Singh Bahadoor* (3), *Thakoor Deen Tewarry v. Nawab Syed Ali Hossein Khan* (4), *Shib Jatun Roy v. Punchanon Bose* (5), *Fakir Chand v. Thakoor Singh* (6). [SIR J. COLVILLE.—These are all suits by reversioners. With regard to the reversioner's right of suit, the effect of the cases is, that he may sue not to declare his own title, but on behalf of whomsoever may prove to be the heir.] In the case of *Lady Langdale v. Briggs* (7), the effect of the decision was that Courts of Equity would not invade the province of the Courts of Common Law by declaring title where there was no equitable relief to be given. But in India the same Court administers both law and equity, so that the Principle on which that case was decided does not apply. We rely, as well as the appellants, on the case of *Sadut Ali Khan v. Khajeh Abdool Gunny* (8), decided by the Privy Council. In that case the plaintiff sued in the Zilla Court for a declaration of his title. He did not ask for consequential relief, which could not have been given him in the shape he wanted it in that Court. He had afterwards to seek his consequential relief by a suit in the Revenue Court for enhancement, and in that suit he failed. That case seems to show that the Indian Courts may declare title even in cases where they can grant no relief. In *Sreenarain Mitter v. Sreemutty Kishen Soondery Dossee* (9) the Privy Council did not say that all cases arising in the Indian Courts should be governed by the decision in *Rooke v. Lord Kensington* (10); they said it was discretionary with the Courts to grant or to refuse declarations of right. [SIR M. SMITH.—In *Sreenarain Mitter's* case (9) relief was prayed for and refused. No affirmatory declaration of title was sought. We were asked to set certain deeds aside, and that we refused.] In the present case the plaintiff did, in fact,

(1) 2 Hay, 608.

(2) B. L. R., Sup. Vol., 48.

(3) 8 W. R., 64.

(4) *Id.*, 341.

(5) 3 B. L. R., App., 55.

(6) 7 B. L. R., 614.

(7) 8 De. G. M. & G., 391.

(8) 11 B. L. R., 203.

(9) *Id.*, 171.

(10) 2 K. & J., 753.

seek consequential relief. The first Court contemplated his taking further proceedings to obtain that relief. That was the purport of the Court's interlocutory order refusing to frame an issue as to the alleged alienations and waste.

As to the interest which will entitle a plaintiff to maintain a suit for a declaration, see *Mussamut Brojo Kissoree Dossee v. Sreenath Bose* (1).

The appellants were not called on to reply.

The judgment of their LORDSHIPS was delivered by

SIR J. W. COLVILLE.—This is an appeal against the decree of the High Court of Madras, affirming a decree of the Civil Judge of which the ordering part is in these words:—
“The Court doth order and declare that, as between the plaintiff and second defendant, plaintiff be declared the next in succession to the Shivagunga zemindari, that plaintiff's claim to maintenance and apartments be dismissed, and that he pay so much of his own costs as may be found due thereon.” There was no appeal to the High Court against the latter part of the decree dismissing the plaintiff's claim for maintenance and apartments, and therefore that which is the subject of the appeal must be taken to be the declaration of the two Indian Courts that the plaintiff is the next in succession to the Shivagunga zemindari.

The title to this zemindari was the subject of a very long litigation, which was finally closed by a judgment of this tribunal in the year 1863 (2). The points then decided were: first that the zemindari was in the nature of an impartible raj, to be held by one member of the family; secondly, that the zemindari having been granted by the Madras Government, after an escheat, to the istimrar zemindar, was to be treated as his self-acquired property; thirdly, that the right of succession to it was to be determined, not by any particular custom, but by the general Hindu law prevalent in that part of India, with only such qualifications as might follow from the impartible character of the subject. These propositions were, at least in the latter

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(1) 8 W. R., 241; and 9 W. R., 463. (2) See 9 Moore's L. A., 539.

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stages of the litigation, not much disputed. That which was really contested between the parties was that even if the istimrar zemindar were, as he had been found to be, in the strict sense of the term a member of an undivided Hindu family, the succession to this zemindari, inasmuch as it was his separate self-acquired property, was to be determined by the rules which regulate the succession to the property of one separate in estate, and consequently, that his wife, daughter and daughter's sons were entitled to inherit it in preference to a brother, a brother's son, or any more remote collateral in the male line. This last point had been first raised by the zemindar's last surviving widow, Angu Muthu Natchiar, in a suit commenced in 1845. It was decided against her by the Judge of first instance in 1847. She appealed against his decree to the then Sudder Court of Madras, but died in 1850, before her appeal was heard. Thereupon there ensued a very complicated and confused litigation amongst the descendants of the istimrar zemindar, touching their respective titles to succeed to the right claimed by the deceased widow, and to prosecute her appeal. The claimants were first Cattama Natchiar, who is the first on the record of the present appellants her sister of the whole blood, and her half-sister, all of whom seem to have been daughters of the zemindar then having, or being capable of having, issue; secondly, Sowmia Natchiar, a fourth daughter, who was a childless widow: and, thirdly Moothoo Vadooga, a grandson of the istimrar zemindar by a deceased daughter, and, as would appear by the pedigree admitted in this cause, an elder brother of the present respondent, who is since dead. The final judgment of this Committee determined both the question of representation raised between these parties, and also the question of succession raised in the widow's suit, against the person claiming as nearest male heir in the Collateral line of the istimrar zemindar. It determined these questions by a declaration in these words; "We shall therefore humbly recommend Her Majesty to reverse the decrees and orders complained of by this appeal; to declare that the suit of 1856, which appear to us to have resulted from erroneous directions given by the Sudder Court,"—that was a suit brought by the widow as an original suit,—“ought to have

been and ought to be dismissed; and in the suit of 1845, to declare that Sowmia Natchiar and Moothoo Vadooaga were not, nor was either of them, but that the appellant and her sisters were, as against the respondent, entitled to prosecute the appeal and to recover the zemindari; this declaration to be without prejudice to the rights of the appellant and her sisters *inter se*." The sisters, as appears by the admitted pedigree in this cause, have since died. There is indeed a statement in Mr. Moore's Report (1) that they were dead at the time when the judgment was pronounced, but, however that may be, it is certain that under the order of Her Majesty, made in pursuance of that judgment, the first appellant became the zemindar of Shiva-gunga, taking it as the heir of her father next in succession to the widow.

That having been the state of things for some years, the present respondent brought the suit out of which this appeal has arisen. The first paragraph of his plaint claimed "to recover the zemindari of Shivagunga for the plaintiff as the eldest surviving male heir of the istimrar zemindar." But this somewhat desperate attempt to re-open the question which had been closed by the judgment of this Board was shortly afterwards abandoned, and by a subsequent proceeding he withdrew the claim to any right to immediate possession, and amended his plaint accordingly. The plaint then went on to pray in the alternative,—“First, to have a declaratory decree passed, establishing the plaintiff's right to succeed to the said zemindari as next heir after the death of the first defendant, and adjudging her to pay him Rs. 60,000 per annum for maintenance, and further declaring him entitled to immediate possession of a portion of the palace, No. 1, which was occupied and enjoyed by his maternal grandmother and mother during their lifetime; secondly, to declare him entitled to immediate management of the devastanams, pogodas, and choultries situated in the said zemindari and of the lands bestowed on them, to receive the honors done by the said devastanams and choultries and to conduct the affairs thereof; thirdly, to grant to him such

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(1) See 9 Moore's L. A., 574.

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further or other relief as the nature of the case will admit of."

The plaint then stated the title of the plaintiff, which is in effect that inasmuch as upon the death of the present zemindar the persons entitled to inherit and to succeed to the zemindari would, according to the ordinary course of Hindu law be the grandsons of the istimrar zemindar, if the estate were partible, he, being the eldest of such grandsons, and the estate being impartible, must be taken to be, by right of primogeniture, the person next in succession to the zemindari. The plaint then raised a case of waste against the first defendant (the zemindar). After mentioning certain leases which are no longer the subject of dispute, it went on to say,—“The first defendant has not leased to the sixth defendant the pannai (cultivated by the owner) and kolkriam (purchased) lands belonging to the said zemindari, which was put in her possession by virtue of the decree of Her Majesty in Council, but she, notwithstanding her being a widow, has alienated, contrary to law, a great part of the said lands, and pledged the state jewels, and incurred debts so as to affect the permanent income of the zemindari.” It then stated some special grounds for coming into Court. It said,—“The first, second, third, fourth, and fifth defendants and others have combined together to defraud the plaintiff of his right to the said zemindari, and the third, fourth, and fifth defendants have executed an agreement to their brother, the second defendant, assigning to him their interest in the said zemindari, which they pretend to have on the death of the first defendant. The first defendant has also executed a document to one Ponnoosamy Tevar, whose daughter was lately married to the second defendant, authorising him (the said Ponnoosamy Tevar) to establish the right alleged by the first defendant to be possessed by her son, the second defendant, to succeed to the zemindari after her death, and to exercise other powers in prejudice to the plaintiff's interests in the said zemindari.” Then followed the case made for the relief prayed in respect of the management of the charitable institutions and for maintenance, which it is unnecessary to state in detail.

The defendants to the suit appeared and set up various

defences, the first and second defendants impeaching the title of the plaintiff upon several grounds; the third, fourth, and fifth defendants setting up a case that the zemindari to which their mother had succeeded had either always been or had become her stridhanam; that according to the proper course of succession it would, upon their mother's death, devolve upon them, but that they had assigned and relinquished by deed their rights in favor of their brother, the second defendant. Upon these pleadings the following issues were settled :—(*readde issues, ante, p. 85.*)

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From the judgment of the Court of first instance it appears that the second, third and sixth of these issues were abandoned. That judgment conclusively disposed of the fourth against the plaintiff, and consequently made it unnecessary to adjudicate upon the fifth. But having decided the seventh issue, whether the suit was one in which a declaratory decree could be given at all, in the plaintiff's favor, it proceeded to decide the first issue also in his favor, and thereupon made the declaration which is the subject of this appeal. The questions raised by these issues were the only questions which were carried to the High Court, and that Court affirmed the decree of the lower Court upon both points.

Their Lordships, feeling that if the seventh issue has been improperly found in favor of the plaintiff, and this is a case in which a declaratory decree ought not to be given at all, it would be wholly unnecessary for them to discuss the first issue, have in the first instance confined the argument to the first of these questions, and now proceed to give judgment upon it.

They at first conceived that the power of the Courts in India to make a merely declaratory decree was admitted to rest upon the 15th section of the Code of Civil Procedure, the effect of which has been so much discussed. Mr. Doyne, however, raised some question as to that, and suggested that the power was possessed by the Courts in the mofussil before the Code of Procedure was passed, and had not been taken away thereby. No authority which establishes the first of these propositions was cited, and their Lordships conceive that if the Legislature had intended to continue to those Courts the

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general power of making declarators^t (if they ever possessed such a power), it would not have introduced this clause into the Code of Procedure, which, if a limited construction is to be put upon it, clearly implies that any decree made in excess of the power thereby conferred would be objectionable, the words of the sections being:—"No suit shall be open to objection on the ground that a merely declaratory decree or order is sought thereby, and it shall be lawful for the Civil Courts to make binding declarations of right without granting consequential relief." Nor does any Court in India since the passing of the Code seem to have considered that it had the power of making declaratory decrees independently of that clause.

The point, therefore, to be determined upon this appeal is, what is the true construction and effect to be given to that clause. It has been broadly urged at the bar that the discretion given to the Courts is absolute, or at least controlled only by those reasonable considerations upon which Courts of Justice may be presumed to act in the particular case brought before them; and that in every case, in which they think fit to make a declaratory decree under that clause they are competent to do so, subject of course to having the exercise of their discretion controlled by the appellate Court in cases in which the latter may think there are sufficient grounds for interfering with a discretion which the Legislature has vested in the lower Court. On the other hand, it is contended that the clause must be construed upon the principles and by the light of the decisions of the English Courts of Equity, upon the 50th section of the 15th & 16th Vict., c. 86, which is in precisely the same words, and that the true limitation of the power of the Courts is that a declaratory decree is not to be made unless there is a right to consequential relief, which, although not asked for might, if asked for, have been given.

We have been referred to a vast number of authorities, some to show what has been the construction given to this clause in the Presidency of Bengal, some to show what construction has been given to it in the Presidency of Bombay, and some to show that a contrary construction has been put upon it in the Presidency of

Madras. We have also been referred to three decisions of this tribunal, which, if clear and explicit on the point, are of course binding upon us. Their Lordships think it will be sufficient as to the Indian cases to say that although the cases in Bengal are not uniform, and some of the Judges there have occasionally used expressions which imply that the Courts have a wide discretion in this matter, still the balance of authority is in favor of the limited construction which the appellants would put upon the clause. In Bombay that seems to be even more decidedly the case, although the Bombay decisions to which we have been referred are not so numerous as those of the Courts in Bengal. It is obvious that an enactment which is intended to apply to all the Courts in India, and which is also a modern enactment, ought to receive the same construction in all those Courts, and that no inconsistent course of practice should be allowed to spring up in any of the Presidencies. That construction must be governed by the decisions of this Board, and their Lordships in the course of the argument intimated an opinion that the three decisions which have been cited do in fact admit the authority and binding force of the decisions in England, and establish that, with such slight qualifications as may be required by the different circumstances of India and the different constitution of the Courts in that country, the application of the clause is to be governed by the same principles as those upon which the Court of Chancery proceeds.

In the first of these cases (that of *Sreenarain Mitter* (1)), decided on the 15th of January 1873 there is a distinct reference to the case of *Rooke v. Lord Kensington* (2). The learned Judge who delivered the judgment of this Committee said:—
“It has been held that under the 15th and 16th Vict., c. 86, s. 50, a declaratory decree cannot be made unless the plaintiff would be entitled to consequential relief if he asked for it—*Rooke v. Lord Kensington* (2). The 15th section, Act VIII of 1859, is in similar terms. The plaintiff, upon the facts found, is not entitled to any relief against the defendant. It has been

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(1) *Sreenarain Mitter v. Sreemutty Kissen Soonderoo Dassie*, 11 B. L. R., 171
(2) 2 K. & J., 753.

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shown that, treating the documents as mere agreements between the plaintiff and the father of the child, the plaintiff could have no right to maintain the present suit." He no doubt afterwards observed :—" It is not a matter of absolute right to obtain a declaratory decree. It is discretionary with the Court to grant it or not, and in every case the Court must exercise a sound judgment as to whether it is reasonable or not under all the circumstances of the case to grant the relief prayed for." It appears, however, to their Lordships that that paragraph is far from claiming an unlimited discretion. The earlier part of the judgment shows that the power is limited by the construction put upon an enactment in the similar words in *Rooke v. Lord Kensington* (1), and what follows is merely to the effect that even in cases in which some consequential relief might, if prayed, have been granted, it would still be a matter of discretion whether the Court should make a mere declaration in the particular case.

The next case was that which has been shortly called the case of *Fyz Ali Khan* (2), decided on the 22nd of January 1873. Upon this point their Lordships then said :—" It must be assumed that there must be cases in which a merely declaratory decree may be made without granting any consequential relief, or in which the party does not actually seek for consequential relief in the particular suit; otherwise the 15th section of the Code of Civil Procedure would have no operation at all. What their Lordships understand to have been decided in India on this article of the Code, and in the Court of Chancery upon the analogous provisions of the English Statute, is that the Court must see that the declaration of right may be the foundation of relief to be got somewhere. And their Lordships are of opinion that the condition is sufficiently answered in the present case, even if it be assumed that no other consequential relief was in the mind of the party or was sought by him than the right to try his claim to enhance in the other forum in which he is now compelled by Statute to bring an enhancement suit." The case there was that the plaintiff had sought as zemindar to

(1) 2 K. & J., 753.

(2) *Sadut Ali Khan v. Khajeh Abdool Gunny*, 11 B. L. R., 203.

enhance the rent of a tebant. He was met by the objection that the zemindari right was not in him. He then had to go, as he could only go for a final determination of that question, to the Zilla Court, but the Zilla Court not having the power to give him the consequential relief in order to which he sought that declaration, namely, the trial of his right to enhance, could only make the declaration, leaving him to seek for his consequential relief in the Revenue Court. The correctness or effect of this decision is not effected by the fact which Mr. Doyne pointed out, that the plaintiff afterwards did go to the Revenue Court, and there, upon the merits of the question being tried, failed to establish his right to enhance.

The most recent case is that of the *Raja of Pachate* (1), decided on the 15th of December 1874. The judgment then delivered contains this passage:—"Their Lordships do not think it necessary to determine whether or not the High Court were right in the conclusion they came to as to the proof or the rebuttal of proof of the bromutter tenure, because in their Lordships' opinion the judgment dismissing the suit is maintainable on totally different grounds. This is in substance a suit for a declaration of title, and it is a suit to set aside, not any deed nor any act, but a mere allegation of the defendants that they had a certain tenure. In their Lordships view, such a suit is not maintainable." After giving the words of the clause, the judgment proceeds:—"A similar clause in this country has been held to give a right of obtaining a declaration of title only in those cases where the Court could have granted relief if relief had been prayed for; and that doctrine has been applied to this clause in the Indian Act. Now applying that test, in their Lordships' opinion this suit is not maintainable. The Raja was not entitled to relief in the shape of an order giving him possession, inasmuch as he was in receipt of the rents and profits; and he sought for and could obtain no other description of possession than that which he had." There is really no conflict between this decision and that which had been ruled in the case of *Fyz Ali* (2). In the case of *Fyz Ali* the plaintiff sought to

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(1) *Raja Nilmoney Singh Deo Bahadoor v. Kales Ohurn Bhuttacharjee*
14 B. L. R., 382.

(2) 11 B. L. R., 203.

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establish the zemindari title, which was properly triable in the Zilla Court, in order that on the title thereby established he might bring a fresh enhancement suit in the Revenue Court. In this case of the *Raja of Pachets* (1) the zemindari title was admitted by all the defendants upon the proceeding; and the question which the Raja sought to conclude by a declarator was that within his zemindari there was no such bromutter tenure as that which some of the defendants alleged to exist in limitation of the right to enhance, which as a zemindar he would presumably have. In short, he wished to get a declaration, the effect of which would be to prevent the fair trial in the Revenue Court of the very question to be tried there; viz., the question whether he as zemindar was entitled to enhance the rents of his tenants or not.

It seems to their Lordships that these three cases do all more or less affirm that the Indian enactment is to be construed as the English Courts have construed the similar provisions in the English Statute, but inasmuch as this question has been so fully discussed at the bar, and there treated as not concluded by those decisions, and as it is desirable to have an authoritative decision upon it, their Lordships think it right to say that if these three cases had not been decided, and if the question were before them as *res integra*, they would come to the above-mentioned conclusion, and I will state as shortly as I can the reasons upon which they would do so.

It is clear that very shortly after the passing of the English Statute, in fact in the course of the following year, the construction of its 50th section came in question in the Court of Chancery. The first decision of Wood, V.-C.,—*Fletcher v. Rogers* (2),—no doubt states somewhat broadly the discretionary power of the Court to make declarators under that enactment, but in the two other cases, which were decided a month or two afterwards, namely, the case of *Greenwood v. Sutherland* (3) and *Garlick v. Lawson* (4), the learned Vice-Chancellor receded from that, and held that the powers of the Court were not so enlarged by the Statute as to enable him to make any declaration touching future interests

(1) 14 B. L. R., 382.

(3) 10 Hare, App. I., p. xii.

(2) 10 Hare, App. I., p. xiii.

(4) *Id.*, p. xiv.

during the life of a tenant for life. In the case of *Garlick v. Lawren* (1) he said :—" Now a declaration in the lifetime of the tenant for life with regard to the interests of the parties entitled in reversion could not have been made in a cause at the time that Statute passed, and therefore could not have been made on a special case. Then came the late Act, which merely said that a suit should not be open to objection on the ground that a merely declaratory decree or order was sought. It enabled the Court, in its discretion, where it should appear to be necessary for the administration of an estate, or to the relief to which a plaintiff might be entitled, to make a decree, notwithstanding it should be merely declaratory. But this was not a case in which it was necessary to do so."

The question next came before Kindersley, V.-C., in *Jackson v. Turnley* (2). At the close of his elaborate judgment on the particular case, the learned Judge says :—" I am of opinion that this question cannot be *litigated*; that the representative of a deceased lessee cannot file a bill against the lessor to litigate the question, whether, in the event of a breach of a covenant taking place, the lessor would have a right founded upon it; and I may observe that the last branch of the section is not unimportant. It says :—" It shall be lawful for the Court to make binding declarations of right, without granting consequential relief." That seems to imply that it contemplates a case in which the Court is capable of giving consequential relief. Here there is not merely no consequential relief asked, but none is capable of being given."

In the case of *Rooke v. Lord Kensington* (3), Wood, V.-C., also put the same construction upon the words of the clause. He said :—" The form of that section of the Statute implies that there is a consequential relief which might be granted in each case when the right has been so declared but that the parties are not to be compelled to ask for that relief, and they may satisfy themselves by simply asking a declaration of right, and not pursuing the matter further."

That decision was followed shortly afterwards by the case of

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(1) 10 Hare, App. L., p. xiv.

(2) 1 Drew., 617.

(3) 2 K. & J., 753.

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Lady Langdale v. Briggs (1) which, is the more important because there, as here, the question was whether the clause empowered the Court to declare future interests. Lord Justice Turner went at great length through the earlier cases, in order to show that it was against the general course and practice of the Court to do this; that that had not been altered by his own Act, enabling the parties to state a case for the adjudication of the Court; and then he proceeded to deal with the argument which had been raised before him, to the effect that under the more recent Statute, the 15th and 16th Vict., c. 86, that power was given. He says:—"Some aid to the appellant's argument on this part of the case was also attempted to be drawn from the 50th section of 15 and 16 Vict., c. 86, the Improvement of Jurisdiction Act, but I take the same view of that enactment as the Vice-Chancellor Wood seems to have taken of it in *Garlick v. Lawson* (2), that it does not extend the cases in which declarations of right may be made, but merely enables the Court to declare rights without following up the declarations by the directions which, according to the old practice, would have been necessarily consequent upon them." Those directions which according to the old practice would have been necessary and consequent, would have involved consequential relief in one shape or another. There is, therefore, no ground for saying that the judgment of Lord Justice Turner did not go to the full extent, as to the construction of the clause of the judgments of Wood, V.-C., in *Rooke v. Lord Kensington* (3). and Kindersley, V.-C., in *Jackson v. Turnley* (4).

What then has been the history of this clause in India? It appears that before the passing of the Code of Procedure it had been extended to India by Act VI of 1854, the 29th section of which is in precisely the same words as the English enactment. I may remark that some of those who sat in the Supreme Court of Calcutta were always anxious that when an English Statute was extended to the presidency Courts, it should be so extended in precisely the same words, in order that those Courts

(1) 8. De G. M. & G., 391.
(2) 10 Hare, App. I., p. xiv.

(3) 2 K. & J., 753.
(4) 1 Drew., 617.

might have, on questions of construction, the advantage of the English authorities, and that it should not be open to counsel to make nice distinctions upon the varying language of the two Statutes. In this instance that principle seems to have been acted upon by the Legislature, and not long after the Indian Act was passed the question of its construction appears to have come before the Supreme Court in the cause of *Sree-mutty Rajcoomaree Dossee v. Nobocoomar Mullick* (1). That Court was bound to act upon the English authorities, and accordingly that portion of its judgment which dealt with this question is in these words:—"One argument, which has been strongly pressed in support of this view, is founded on the 29th section of Act VI of 1854. But that enactment only removes the objection to the suit, which consists in its seeking merely a declaration of right without a consequential relief. It leaves untouched the objection that may consist in the want of sufficient interest in the plaintiff to maintain such a suit, or in the absence of material parties interested in the question. And the cases cited by Mr. Advocate-General show that the Courts at home, neither under the similar section in the English Statute, nor under Sir George Turner's Act, will exercise their discretion in declaring rights where the parties principally affected are not before them." The cases cited were the cases which had then been decided on the construction of the English Act. And this decision shows that the construction which had obtained in the Court of Chancery was adopted and acted upon by the Supreme Court of Calcutta.

Then came Act VIII of 1859, or the Code of Civil Procedure, in framing which the Legislature thought fit to pick out of Act VI of 1854 the 29th Section, and to embody it in the very same words in the new Code. It seems to their Lordships unreasonable to suppose that the Legislature did not mean to use the words in the sense which by judicial construction they had then obtained. Again, it is to be observed that when the Supreme Court of Calcutta ceased to exist, and the High Court was created, the Charter of the new Court required that Court to be guided in its original jurisdiction by the principles which

(1) 1 Boulnois, 127.

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had governed the Supreme Court. Unless, therefore, the limited construction put upon the clause by the Supreme Court is to prevail generally in all the Courts of India, we must come to the absurd conclusion that the same words are to be interpreted by the High Court in one sense when it is exercising its original jurisdiction or sitting on an appeal from a decree made under that jurisdiction, and in a different sense when it is sitting on an appeal from a mofussil Court; and further that the Legislature has by the same form of words intended to make one law for the mofussil Courts and another for those of the Presidency Towns.

It appears, therefore, to their Lordships that the construction which must be put upon the clause in question is, that a declaratory decree cannot be made unless there be a right to consequential relief capable of being had in the same Court or in certain cases in some other Court. They admit the qualification introduced by the case of *Fyz Ali* (1).

With respect to the course of decision in the Presidency of Madras, it is to be observed that some of the earlier cases decided there adopted the English construction. In others, the Judges who claimed a wider discretion as to making declaratory decrees, have assigned as a reason for its exercise that there does not exist in India the power of entertaining a suit to perpetuate testimony. That reason does not apply to the present case in which there is no testimony to perpetuate, but in no case is it a satisfactory reason. The proper remedy for such a defect in the administration of justice, if it exists, is an Act of the Legislature. It cannot be supplied by putting an erroneous construction, or a different construction from that which prevails in other parts of India, upon a Statute which has no reference to the subject. It may be observed further upon the Madras case that the Courts there do not appear really to have claimed, as Mr. Doyne has claimed for them, an uncontrolled discretion in making declaratory decrees. The Judgment of Scotland, C.J., in this very case certainly does not go so far. He says:—"It has been decided by this Court that the rule of the Equity Courts in England is not applicable to declaratory suits here,

(1) 11 B. L. R., 203.

and it is now settled that a suit praying nothing more than a declaration of title is maintainable under the 15th section of the Code of Civil Procedure, although no consequential relief be grantable upon the declaration, if a good ground for seeking the protection of such a suit is shown to exist." What I have already said on the part of their Lordships shows that they dissent from that position ; but still the very proposition admits that there must be some special ground "for seeking the protection of such a suit." He then refers to the last decided case, and the conclusion which he draws from the decision is this :—"To support such a suit there must appear to have been some act done which had worked or was likely to cause injury or serious prejudice to the plaintiff's alleged title, and in the present case I think that ground does appear." Then he proceeds to consider the special grounds which exist in this case. Holloway, J., goes further, and says that the mere quieting of doubtful titles would be a sufficient reason and a better reason than the fact of alienations having been made. The principle so stated, if acted upon, would open the door to the determination of future interests whenever one party chose to think it desirable that a dispute as to title which might at any time afterwards crop up, should be determined by a declarator.

Having said thus much on the construction of the Act, their Lordships will now deal with the arguments which have been addressed to them to show that even upon the limited and strict construction of the enactment this decree may be maintained. The first point upon which it is desirable to observe is that of the claim to maintenance. Upon that it is only necessary to say that the suit must now be treated as if the claim to maintenance had never been put forward. There has been a final adjudication between the parties as to the right to maintenance. It was held by the Lower Court that even if the plaintiff were unquestionably the next in succession to the zemindari, he would have no right to claim present maintenance from the zemindar, and there was no appeal from that decision to the High Court.

It will be convenient to consider next the grounds which the

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High Court of Madras seems to have considered sufficient to justify the declaration. The Chief Justice says :—" It appears that the first defendant favoring the second defendant's title, and concerting with him in opposition to the plaintiff, had employed an agent, and executed a power of attorney to him, for the purpose of assisting the second defendant to possess himself of the zemindari, and withhold possession after her death. This, without reference to the other acts alleged, is sufficient to show an extreme determination of hostility towards the plaintiff, and there can be no doubt, I think, that serious injury to the plaintiff's right is the probable, if not certain, result of the opposition thus begun." It appears to their Lordships that the defendant, the zemindar, was perfectly competent to grant that power of attorney, and that there is nothing in it which would give the plaintiff a right if he had brought a suit for that purpose to have it set aside. It can, from the very nature of the instrument, operate only during the zemindar's lifetime, and we are not to assume that any act will be done under it which the plaintiff would have a right to impeach ; but if any such act is done under it, as, for instance, if she were to devolve the succession upon her son, so that his interest might become absolute, or the like, their Lordships, by their decision upon the present question, would by no means preclude the plaintiff from seeking to impeach that act, and to treat it as invalid. They do not prejudge any question of that kind which may arise. Holloway, J., as before remarked, rested his judgment broadly on the necessity of quieting titles, which their Lordships think is a ground far too wide for adoption, and one that cannot possibly justify the declaration in this case ; because, independently of the construction of the Statute, it appears to have been very reasonably ruled in India that the Court will not try questions of title as to future interests where neither claimant has a right to present possession, especially questions of title which, like the present, may never arise ; see *Sreemutty Pranputtee Koer v. Lalla Futteh Bahadoor Singh* (1).

A further question is raised by the pleadings, which was hardly adverted to in the argument, namely, the title set up by

(1) 2 Hay, 608.

the sisters and the grant of their interest to the second defendant; but that cannot give the plaintiff a right of action in this case if it does not otherwise exist. That transaction cannot affect the interests of the plaintiff; if these ladies would have no title against him they cannot have given a better title than they had themselves to the second defendant. It, at most, raises another point to be determined, should the title to this zemindari come, on the death of the existing zemindar, to be properly litigated between the plaintiff and the second defendant.

The point which, though not adverted to in the judgment of the High Court, has been mainly pressed upon their Lordships by the learned Counsel for the respondent, is, that the plaintiff originally made a case of waste, that it was necessary that the right of the plaintiff as nearest reversioner should be ascertained in order to support such a suit, and that if the suit had been tried out as it was at first framed there would have been a case for consequential relief. The course the case took was that when it came before the Judge for the settlement of issues, he thought that the question of waste ought not to be tried in this suit. There was afterwards an application made to him to frame an additional issue, which he rejected? and the reasons for his coming to that conclusion are the following:—"At the settlement of issues the Court was of opinion that the question of alienation of the revenues of the zemindari was not one which had any place in the present suit, which should be confined as much as possible to the real object in view, which is to ascertain whether or not plaintiff is the proper person to succeed to the zemindari at the death of the Ranees. At present plaintiff has no title either in possession or expectancy, and until he has established his right as remainderman he is not in a position to question anything that may be done in regard to the disposal of the property by the present proprietor. Moreover, it would be impossible to frame an issue on this point, when the property said to be alienated is not distinctly specified, and when the parties who must necessarily be in possession are not parties to the suit. It is not contended that these alienations can operate beyond the lifetime of the present Ranees, and therefore if plaintiff is successful in establishing his right to succession;

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RAGGONADAH
RANEE
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PUREE
NATCHIAR
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TETAR.

1875

SRINATHOO
MOOTWOO
VLIA
RAGGONADAH
RAWER
KOLLANDA-
PURRE
NATCHIAR
v.
DOMASINGA
TEVAR.

he will have ample opportunity in future of preventing injury to the property. If, on the other hand, he is unsuccessful, the disposition of the property is a matter with which he has no concern." The plaintiff appears to have acquiesced in this interlocutory order. If he had thought it had improperly affected his case, he might have raised before the Appellate Court the question of its propriety, under the section of the Code which enables him to do so, and that question would then have been regularly before us. Considering the frame of the suit, their Lordships do not think the order was improper or unreasonable.

The arguments now under consideration are founded on the right of a reversioner to bring a suit to restrain a widow or other Hindu female in possession from acts of waste, although his interest during her life is future and contingent. Suits of that kind form a very special class, and have been entertained by the Courts *ex necessitate rei*. It seems, however, to their Lordships that if such a suit as that is brought, it must be brought by the reversioner with that object and for that purpose alone, and that the question to be discussed is solely between him and the widow; that he cannot by bringing such a suit get, as between him and a third party, an adjudication of title which he could not get without it. Here if the plaintiff had brought his suit to restrain the widow from acts of waste, he might, no doubt, have had to prove, not merely the acts of waste alleged, but a title sufficient to give him a *locus standi* in Court. Their Lordships are not prepared to say that by showing that he was a grandson of the istimrar zemindar, although a doubtful question might thereafter arise between him and the second defendant as to which should succeed to the zemindari, he would not have established a sufficient *locus standi* against the widow, and the right to have her acts of waste restrained for the protection of the estate. This, however, would not necessarily give him a right to bring the second defendant into Court in order to obtain a final adjudication of title against him.

It appears, therefore, to their Lordships that, even if the plaintiff had proved acts of waste against the widow, which he has not done, that would not have given him a right as against

the second defendant to have the question which arises between them determined by a declarator.

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VIJIA
RAGGONADAN
RAMES
KOLANDA-
PUREE
NATOHIAH
v.
DOEASINGA
TEVAR.

Upon these grounds, their Lordships think that both the Courts below have come to a wrong conclusion upon the seventh issue; and holding that, they conceive it would be improper for them to intimate any opinion as to the correctness or incorrectness of the very learned judgments given in India on the first issue. Consequently it will be their Lordships' duty humbly to advise Her Majesty, on the finding upon the seventh issue, to dismiss the suit of the respondent, but without prejudice to any question of title to the zemindari which he may hereafter be entitled to assert on the death of the first defendant, the zemindar. We think that as he brought a suit which he ought not to have brought, he must pay the costs of the suit in the Indian Courts and those of this appeal.

Appeal allowed.

Agents for the appellants: *Gregory, Rowlifes, and Rawle.*

Agent for the respondent: *D. W. Logie.*

APPELLATE CIVIL.

Before Sir Richard Couch, Kt., Chief Justice, and Mr. Justice Birch.

KARIM SHEIKH (ONE OF THE DEFENDANTS) v. MUKHODA SOONDERY
DASSEE (PLAINTIFF).*

1875
Feb. 12.

*Beng. Act VIII of 1869, s. 102—Co-sharer—Suit for Rent—24 & 25 Vic.
c. 104. s. 15—Superintendence of High Court.*

The plaintiff, one of several co-sharers of a talook, sued to recover her share of rent making her co-sharers, who resisted her claim, defendants. The first Court raised and tried questions of title between the plaintiff, her co-sharers, and the ryot, and decided in favor of the plaintiff. The lower Appellate Court, without expressing any opinion on the rights of the parties dismissed the suit on the ground that it was not maintainable. On special

* Appeal under s. 15 of the Letters Patent from a decree. Phofar, J., in Special Appeal No. 555 of 1874, dated the 24th November 1874

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appeal it was contended that no appeal would lie, as the amount of the claim was less than Rs. 100, and no question of title was determined by the judgment; but this objection was overruled on the ground that the decree of the lower Appellate Court, dismissing the suit, had the effect of deciding the questions of title against the plaintiff. It was also held that even if this view were incorrect, it was a case in which the jurisdiction vested in the Court under s. 15 of 24 & 25 Vict., c. 104, ought to be exercised. On appeal under s. 15 of the Letters Patent, *held* that the judgment rather than the decree is to be looked at in applying s. 102, Beng. Act VIII of 1869. No appeal lay from the judgment of the lower Appellate Court, inasmuch as that judgment showed, not only that no question of title was determined, but that the Judge did not even consider it. *Held* also that the power conferred by the 15th section of 24 & 25 Vict., c. 104, ought not to be exercised in such a way as to do indirectly that which the law forbids to be done directly.

THIS suit was brought for Rs. 6-8 as arrears of rent. The plaintiff alleged that her deceased husband had a 4-anna share in the paternal talook of the third and fourth defendants and himself; that the co-sharers were all in possession by realizing rents from the ryots through a common gomasta, who divided the collections among them according to their respective shares; that misunderstandings having arisen between the plaintiff and the other co-sharers, the plaintiff began to collect the rents due for her share separately from 1278; that the first defendant held a jama within the mehal of Rs. 45-6-5 gandas, whereof Rs. 11-5-11-1 cowri was due to the plaintiff for 1278 (1871-72) of which the defendant had paid Rs. 5. The ryot-defendant in his written statement said that the plaintiff had no right or title to the talook in question, and neither she nor her deceased husband was ever in possession thereof; that he had always paid rents to the gomasta of the third and fourth defendants, including the rent of the year for which the claim was made; and that the suit had been falsely brought in consequence of a misunderstanding between the plaintiff and his landlords.

The third and fourth defendants, the co-sharers said that they were the sole owners, and had always collected rents from the ryots.

The Munsif trying the question of title raised before him, made a decree for the plaintiff for the sum claimed and interest

There was an appeal to the District Court by the ryot-defendant, which was heard by the Additional Judge, who, after shortly stating the facts, gave the following judgment :—

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Now, the first question the Munsif should have considered was whether a suit of the kind would lie. The current of decisions in the High Court for some time back has been that a sharer cannot sue a ryot separately for his proportion of the rent, unless there has been an express agreement to that effect on the part of the ryot. The Munsif has relegated the question to the second last paragraph of his judgment, and has there dealt with the subject in a very inadequate manner. He appears not to recognize the fact that the rule is for the protection of the ryot who would otherwise be liable to have his rent split up into infinitesimal fractional portions, and have to spend half his time looking for his landlords. The [Full Bench decision of the High Court in the case of *Indar Chandra Dugar v. Brindaban Bihara* (1) lays down the law on the subject; and, had it been followed by the Munsif in the present instance, this suit would have been dismissed at once.

From the wording of the plaint, it is perfectly apparent that the ryot has never agreed to pay separately to the several proprietors nor in fact done so. The allegation in the plaint of his having paid rent of the Rs. 11 odd due for 1278 B.S. (1871-72) to plaintiff separately, is, I have no hesitation in saying, a mere falsehood, asserted to attempt to evade the force of the late decisions. On the same ground then, that the plaintiff is only a sharer and cannot sue separately for her proportion of the rent from the ryots, I decree this appeal with costs.

From this decision the plaintiff appealed to the High Court. The ryot-defendant again appeared and opposed the appeal, which was heard before :—

PHEAR, J. (who, after reading the judgment of the District Judge, continued.)—The Judge has here omitted to state, that although the plaintiff sued alone to recover a share only of the rent due from the ryot-defendant, yet she made her co-sharers co-defendants, and that these co-defendants resisted her right to recover in this suit.

It appears that it was an issue between the parties in the first Court, whether or not the plaintiff was entitled to receive

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any share of the rent. The plaintiff maintained that she was, and she complained that the ryot-defendant had not paid this share. This issue was decided by the Munsif adversely to the defendants. The Judge refuses to go into the merits of the case at all, as it was laid before the first Court, on the simple ground that, as the plaintiff is only one sharer out of several co-sharers, she cannot sue separately for her proportion of the rent due from the ryot.

It appears to me that the Judge misapprehended the doctrine which the Full Bench decision quoted by him affirmed, and which had been repeatedly laid down and acted upon by Division Benches of this Court before that decision was passed. It is true that the long current of decisions has been to the effect that each sharer of rent has no right independently of his co-sharers to bring a suit against a ryot for his aliquot part of the rent, unless he can place his suit upon the ground of a contract on the part of the ryot to pay him that part separately from the rest. And the Judge is quite right in supposing that this rule of law is dictated in a very large degree by considerations for the ryot. It has the effect, as the Judge remarks, of protecting him from having his rent split up into infinitesimal fractions, and from being sued by each one of the shareholders separately for each fraction.

But this suit, as the plaintiff has brought it, is very different from anything that the rule was directed against. In truth it is difficult to understand how the plaintiff could obtain any remedy for the wrong which she complains of, if the view of the Judge is correct. In the present instance it is plain, even if the plaint does not say so in express words, that she could not get her co-sharers to sue with her. They resisted her right to have any share of the rent at all, and the only mode in which she could get the question at issue between herself and her co-sharers and the ryot decided by a Court of law was that which she has adopted, namely, to make her co-sharers defendants as well as the ryot from whom she sought to recover the rent. A suit of this kind protects the ryot from being sued again. The suit of the plaintiff thus brought against the ryot is, or should be, treated as a suit on behalf of all the shareholders collectively,

although she stands alone as the plaintiff. The question whether the ryot had paid the whole of the rent due to all the co-sharers jointly, or not, could be and ought to be decided in a suit of this kind once for all, and the decision of this suit, if the issues were properly framed, would be an answer to any claim which might be made against the ryot by any of the co-sharers in another suit. The Judge, as I have already mentioned, has deliberately refused to try the matter which was thus brought before the Court. And it appears to me that he is wrong in law on this point.

Two objections have been made on behalf of the respondent to my entertaining this appeal. The first is that if the decree of the Judge is a decision *inter partes* on the merits, then the case falls within s. 102 of the Rent Law: and inasmuch as the amount of the rent is only Rs. 6 odd, and as the judgment of the Judge does not determine any question of right to enhance or to vary the rent of a ryot, or any question relating to title to land or to some interest in land as between parties having conflicting claims thereto, therefore this Court has no jurisdiction to entertain this suit.

The other objection is that if this decree be not operative as a decision *inter partes*, but the Judge has by his judgment simply declined to entertain jurisdiction in his Court, then the proper remedy cannot be applied on an appeal of this kind.

It seems to me that, as the case now stands, it probably would be dangerous to treat the decree of the lower Appellate Court as not operative upon the rights of the parties. The lower Appellate Court is a Civil Court competent to determine all questions of civil rights between the parties before it and unquestionably upon the footing of the plaint and the written statement, more than one issue of right between the plaintiff and some of the defendants, involving conflicting claims to property, arose. These were determined in favor of the plaintiff by the first Court, and the decree of the lower Appellate Court by dismissing the suit, if it stands unqualified, must have the effect of deciding them against her. If this is so, although in the judgment itself there is no expression of opinion on the part of the Judge as to the rights of the parties, yet the decree

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has, within the latter words of a 102 of the Rent Law, determined questions between parties having conflicting claims to an interest in land. But even if this view be not correct, I think, I ought, in a case of this kind, to exercise the jurisdiction which is reposed in this Court by the 15th section of the Charter Act. The Judge ought in my opinion to have entertained this suit, and decided it between the parties upon the merits. It is true that the appellant has not in terms asked for special interference of this Court upon the footing of s. 15 of the Charter Act, but he has asked for a remedy which this Court can give by an exercise of the power which is conferred upon it by that section. And unless the mode in which the matter is brought before this Court is such as to place the respondent in a disadvantageous position in regard to answering the petitioner's complaint, it appears to me that there is no reason why that power should not be exercised upon this occasion. Of course, if upon the petition of the plaintiff and the written statement and the judgments of the lower Courts, I could not see facts which would justify the exercise of the extraordinary power of the Court, I should be in duty bound to refuse to interfere, leaving the petitioner, if she chose, to make an entirely independent application on the subject. Again, on the other hand, if I had any reason to suppose that the respondent had not had any fair opportunity of meeting the facts which have been disclosed in the pleadings and in the judgments of the lower Courts, I ought to abstain from interfering now, and so afford him time to answer the application of the petitioner when it should be made in another shape. On the whole, however, there does not appear to be any reason why I should refrain from dealing with the case as it stands. The facts found by the lower Court are very plain and distinct; they are indeed relied upon by the respondent himself, and he does not desire to add anything to them.

As I understand those facts and the course taken by the lower Appellate Court, it seems to me plain that the Judge has been entirely wrong in refusing to consider and determine this case upon its merits, and, that being so, it is the duty of this Court to put him right.

On the whole, I think the decision of this Court ought to be that the decree of the lower appellate Court be reversed, and the case remanded to that Court for trial upon its merits.

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From this judgment, an appeal was preferred by the ryot-defendant under cl. 15 of the Letters Patent.

Baboo Bashi Behary Ghose for the appellant.—By s. 102 of Beng. Act VIII of 1869, no appeal lies to this Court, as there has been no determination of title by the District Judge. If the decree of the Judge were looked at alone, it might have been contended that there was a final determination of title, having regard to the issues in the case: but a decree is always to be explained by the judgment, and s. 102 says there is to be no appeal when there is no question of title determined by the judgment.

The interference of the High Court under the Charter Act was improper, inasmuch as there was no declining of jurisdiction by the second Court. At best there might have been an error in law on the part of the Judge if he was wrong in thinking that the suit could not be maintained.

Baboo Mohesh Chunder Chowdhry for the respondent.—S. 102 of Beng. Act VIII of 1869 contemplates merely a suit between landlord and tenant; but when others, co-sharers for instance, are made parties, the suit necessarily becomes one involving question of title. The appeal is not taken away in that case.

Where it appears to the Court upon the whole case that there was a question of title between the parties which was decided by the Court of first instance, and the lower Appellate Court, without expressly deciding that question, reversed the decision of the first Court, the right of appeal is not taken away in such a case, because the reversing the decision of the first Court, which gave the case in favor of the plaintiff in a question of title, is in itself a determination of title within the meaning of the section. The intention of the Legislature must be construed to have been to allow an appeal to this Court when there is a question of title in the case between the parties, and not when there is none.

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The exercise of the power vested in this Court by ss. 9 and 15 of the Charter Act was properly exercised by Phear J., in remanding this case to the Judge to do that which he erroneously neglected to do under a misapprehension of the law. He, in effect, refused to go on with the case on the ground that the suit would not lie; but a Full Bench of this Court in *Doorga Churn Surma v. Jampa Dassee* (1), the facts of which case were precisely the same as here, held that such a suit was maintainable. There is nothing in the Charter by which the exercise of the powers of superintendence conferred on the High Court is to be restricted to cases of jurisdiction only.

The judgment of the Court was delivered by

COUCH, C.J., (who, after stating the facts, continued).—I think we should first consider whether a special appeal lies in this case. If it does not, it is not necessary to determine whether the decision of the lower Appellate Court is right; and as the law cannot be considered as settled by the Full Bench decision in *Doorga Churn Surma v. Jampa Dassee* (1), it is better not to do so; for it might be said hereafter that our opinion upon this point was extra-judicial. By s. 102 of Beng. Act VIII of 1869, an appeal does not lie to this Court in a suit such as this is if the amount sued for, or the value of the property claimed, does not exceed one hundred rupees, and a question of right to enhance or vary the rent of a ryot or tenant, or any question relating to a title to land, or to some interest in land as between parties having conflicting claims thereto, has not been determined by the judgment. It is true that the decree of the lower Appellate Court simply dismisses the suit, which was the only decree that could be made upon the judgment that was given. But the judgment shows, what was determined, and s. 102 uses that word, showing, I think, that the judgment and not the decree is to be looked at in applying that section. Where the judgment shows, not only that a question of title was not determined, but that the Judge did not even consider it, I think a decree in general terms cannot be held to have deter-

(1) 12 B. L. R., 289.

mined it. There are many cases in which the Court has resorted to the judgment for the interpretation of the decree, and there is frequently such a want of precision and accuracy in the decrees that if this were not done, much injustice would ensue. For instance, if another suit were brought by the plaintiff to try the question of title between herself and the third and fourth defendants, I think the Court could not say that the question had been heard and determined in this suit so as to make s. 2 of Act VIII. of 1859 applicable. If it said so, it would be contrary to the fact, and the plaintiff would be concluded by a supposed determination when none was made. But the learned Judge said that even if his view of the decree were not correct, he thought he ought to exercise the jurisdiction which is reposed in the Court by the 15th section of the Charter Act. As to this, the question appears to me to be whether, where the objection to the proceeding or judgment of the lower Court might be taken in an appeal and there is no want of jurisdiction, the lower Court having only erred in the exercise of it, and the appeal is expressly disallowed by law, the Court should exercise the power conferred on it by the 15th section. This would be to do indirectly what the law says the Court shall not do directly, and would be refusing to give effect to the law which disallows the appeal. In my opinion, the superintending power of the Court ought not to be used in this way, and as a matter of discretion I would not exercise it in this case. The title of the plaintiff to a share of the rent may be tried in a suit against the persons who have received it from the ryot without making him a defendant. We reverse the order appealed from, and dismiss the special appeal with costs including the costs of this appeal.

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Appeal allowed.

PRIVY COUNCIL

HURRONATH ROY AND OTHERS (PLAINTIFFS). v. GOBIND CHUNDER
DUTT (DEFENDANT).

AND, BY REVIVOR,

KALI DOSS ROY AND OTHERS (PLAINTIFFS) v. GOBIND CHUNDER
DUTT (DEFENDANT).

P. C.*
1875
Feb. 10, 11,
& 12.

[On appeal from the High Court of Judicature at Fort William in Bengal.]

*Enhancement of Rent—Reg. VIII of 1793, s. 51—Act X of 1859, s. 15—
Dependent Talook.*

A dependent talook created before the decennial settlement is protected from enhancement by s. 51, Reg. VIII of 1793, except under the circumstances therein mentioned.

In a suit by a zemindar for enhancement, brought after Act X of 1859 came into operation, against the holder at a fixed rent of a dependent talook, the latter is protected from enhancement by the provisions of s. 15 of that Act, notwithstanding decrees pronounced in previous litigation between the parties declaring the zemindar's right to enhance, and directing that the rent of the talook should be assessed at pergunna rates, if it appear that the rent never has been assessed at pergunna rates, and never has been enhanced, but has remained unchanged from the time of the permanent settlement.

Such decrees place the zemindar in no better position than other landlords, who, previously to the passing of Act X of 1859, had a good right to enhance, but whose right, not having been exercised from the time of the permanent settlement, has been taken away by the 15th section of that Act.

APPEALS, from judgments of a Division Bench (L. S. Jackson and Phear, JJ.) of the Calcutta High Court, dated respectively the 12th and 15th January 1866, passed in two suits brought by the appellants against the respondent in the Revenue Courts of Jessore.

The first in date of these suits was instituted on the 2nd August 1862, to recover, pursuant to notice, an enhanced rent in respect of a talook named Oomedpore for the first three months of the Bengali year 1269, or from the middle of April to the middle of July 1862; and the second suit was instituted

*Present:—SIR J. W. COLVILLE, SIR B. PEACOCK, SIR M. E. SMITH, AND
SIR R. P. COLLIER.

on the 11th June 1864, to recover rent of the same talook, at the like enhanced rate, for the succeeding nine months of the same year.

The Talook Oomedpore was created in May 1783, i.e., before the decennial settlement of Jessore, by deed, at a stated rent and as an hereditary estate, by the then zemindar in favor of the predecessor in estate of the defendant Gobind Chunder Dutt. No revenue sale had since taken place, nor had anything else occurred to effect the rights of the talookdar under the original grant, unless such effect were given to two decrees of the late Sudder Court, dated respectively, the 30th April 1821 and the 11th December 1860.

The plaintiffs' contention was that the effect of these decrees was to declare that the rent of the talook might be enhanced at pergunna rates, and they claimed at these rates to have an enhanced rent of Rs. 36,000, substituted for the rent of Sa. Rs. 7,825 or Co.'s Rs. 8,346, which had been reserved by the original grant. The defendant, on the other hand, contended that these decrees had not the effect attributed to them by the plaintiffs; and that in any case the claim was governed by Act X of 1859, under which, notwithstanding these decrees, his rent, which had not been altered from the date of the permanent settlement, was not liable to enhancement.

The Collector held that the effect of the decrees was that alleged by the plaintiffs, and that the defendant was not protected by the provisions of Act X of 1859. He accordingly deputed an Ameen to ascertain the area of the talook and the pergunna rates, and, after the Ameen had made his report, he passed a decree in conformity therewith and awarded the plaintiffs a rent, at pergunna rates, of Rs 27,447, by the year.

The Division Bench of the High Court, when the case came before them on appeal, declined to express any opinion as to the effect of the decrees relied on by the plaintiffs, considering that as the suit had been brought after Act X of 1859 had come into force, and the rent originally reserved had "admittedly never varied," the defendant was protected from enhancement under the 15th section of that Act (1).

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The present appeal was brought from this decision: and as the principal contention of the appellants was to show that the High Court had wrongly excluded consideration of the earlier litigation, the following account of that litigation may be found useful for a right apprehension of the questions in issue:—

On the 27th Baisakh 1195 (16th May 1788), Raja Gobind Deb Roy, the then zemindar of a one-fifth share of Pergunna Makomedshahee in Jessore, on the occasion of the investiture with the Brahminical thread of his son Rajendro Deb Roy, executed a deed of gift in favor of the latter, by which he conferred upon him the Talook Oomedpore to be held by the grantee "his sons and heirs in succession, paying the revenues fixed thereon," which were stated to be the net jama of Sa. Rs. 7,825. The grantee was empowered by the grant to have his own name recorded in respect of the talook "at the Sudder office," and it was declared that "neither the grantor nor his heirs had any further claim thereon."

The zemindari of Gobind Deb Roy having been sold not long after in execution of a decree of the Supreme Court, the purchasers, predecessors in estate of the present appellants, disputed the rights of the grantee, who thereupon brought a suit to have them declared. The result of this litigation was that on the 30th May 1811, the Sudder Court, reversing a decree of the Zilla Court, ordered "that the appellant (Rajendro Deb Roy, the talookdar), having been put and maintained in possession of the taraf aforesaid, do pay the rents to the respondent, in accordance with the amount laid down in the tahut of the decennial settlement which the appellant used to pay to the former zemindar." In this decision the amount of rent reserved by the deed of gift is mentioned as above stated, but nothing is specified as to the amount then appearing in the tahut, i.e., the Collectorate statement of revenue payable to Government.

On the 17th September 1812, a fresh suit was instituted by the purchasers of the zemindari in which they sought to have effect given to the decree of the Sudder Court of the 30th May 1811, under which they contended that they had been declared entitled, not to the rent specified in the deed of gift, but to that mentioned in the tahut of 1790, which they alleged

was Sa. Rs. 9,268, at which rate they prayed to have the talook "finally assessed,"

It would appear from the terms of the final decision in this case that the parties differed not as to the liability of the defendant to pay the amount appearing in the taluk of 1790 but as to what that amount was, the plaintiffs alleging it to be, as stated in their plaint, while the defendant contended that it was, after certain deductions from the amount named in the deed of gift, Sa. Rs. 7,631.

The Zilla Judge decided the case in accordance with the contention of the plaintiffs, but on appeal the Provincial Court reversed that decision, and dismissed the suit with costs. The plaintiffs having then preferred a special appeal to the Sudder Court, that Court, on the 30th April 1821, delivered the first of the judgments on which the present appellants relied. They held that certain documents put forward by the parties respectively were not trustworthy, and that the Provincial Court was right in rejecting the plaintiffs' claim as supported by his documentary evidence. But, inasmuch as the defendant had not adhered to the jama reserved in his deed of gift, but had claimed a deduction to which he had not proved himself to be entitled, and as proof had not been given of a regular and uniform payment, the Court, to end disputes, ordered that "the jama of Talook Oomedpore be fixed according to pergunna rates, and in accordance with the rules laid down in s. 8 of Regulation V of the year 1812."

It appears that this declaratory order was not acted upon, the rents of the talook continuing from that time down to the date of the present litigation to be paid and received at the rate reserved in the deed of gift. Various rent suits, in which the rent demanded and recovered was in conformity with that rate, are noticed in their Lordships' judgment.

In the year 1855, the zemindar sued the talookdar to enhance at pergunna rates the rent of Oomedpore. The Court in which the suit was brought decided against the zemindar's right to enhance. On appeal, however, the Sudder Court, in a judgment dated the 11th December 1860, recognized the plaintiffs' right of enhancement as established by the previous decision of

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the 30th April 1821; but inasmuch as they had served no notice of enhancement, the Court declined to decide what enhancement should be made until such notice had been duly served. This order was affirmed on review on the 30th June 1861.

While the suit last mentioned was pending, Act X of 1859 came into force. That Act was in some respects not material to the questions raised in these appeals, modified by Beng. Act VI of 1862. The suits under appeal were, as stated in the plaints, brought under these laws, after service of a notice of enhancement, which is set forth at length in their Lordships' judgment.

The two appeals were consolidated by an order of Her Majesty in Council.

Mr. JESSE, Q.C. (Mr. J. ARTHUR with him) for the appellants.—The onus lay with the respondent who sought to avail himself of the provisions of s. 15, Act X of 1859, to show that, under the terms of that section, he has held at a fixed rate which has not been changed from the time of the permanent settlement. But in the suit in which the decree of the Sudder Court of the 30th April 1821 was made, it was found that the respondent's predecessor had failed to prove that a uniform fixed rent had been paid up to the date of that suit, and the Court directed that, in the absence of such proof, the land was to be assessed at the rates prevailing in the pargana. That decree not having been appealed from became final and binding. There was no rent fixed or payable in the original contract between the zemindar and raiyat as to bring the case within the provisions of s. 15, Regulation VIII of 1793. The decree of the Sudder Court on the 30th December 1860 (1) was conclusive as to the appellants' right to enhance.—*Superior Court of Judicature v. The Government of Bengal*.

MR. JUSTICE JESSE and MR. JUSTICE ARTHUR for the respondents.—To reverse the decision of the Sudder Court and affirm that of the Collector, who found the respondent in a permanent position. The rent would be raised, while he could not raise the rates of the holding under him. It is stated in the plaint as a

common occupancy ryot, although even before Act X of 1859 was passed the law recognized a distinction between the case of a dependent talookdar and that of a ryot. Before that Act came into force, the zemindar was not at liberty to enhance as he pleased. An exemption in favor of the talookdar was provided by s. 51, Regulation VIII of 1793. S. 49 of that Regulation relates to a distinct class of persons, and does not apply here. The position of the talookdar under the old law will be seen from the judgment of the Privy Council in the case of *Bamasoondery Dassiah v. Radhika Chowdhraïn* (1). The provisions of s. 8, Regulation V of 1812, do not infringe on the exemption contained in s. 51, Regulation VIII of 1793, but provide a different rule for assessing the rates payable by talookdars where these are open to enhancement. Where the rent of a talookdar can be enhanced, it must be enhanced, not in accordance with the ordinary pergunna rates, but with the pergunna rates payable by similar holders—*Baboo Dhunput Singh v. Gooman Singh* (2); see also the decision of the Privy Council in the case of *Soorasoodery Dabee v. Gholam Ali* (3). [Mr. Leith.—This objection was

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(1) 13 Moore's I. A., 248; S. C., 4 B. L. R., P. C. 8.

(2) 11 Moore's I. A., 433; see p. 408.

(3) PRIVY COUNCIL.*

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[On Appeal from the High Court of
Judicature at Fort William in Bengal.]

June 29th, July 2nd, 1872, and January
24th, 1873.

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Act X of 1859, ss. 13 and 17—Notice
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was agreed in the kabuliath should hold during 1260 without any rent, "for 1261 at the rate of Rs. 1 per kanee; for 1262 at Rs. 2 per kanee; for 1263 at Rs. 3 per kanee; and in 1264 at the full customary rate of Rs. 5 per kanee." The tenure was admittedly a permanent one. In a suit for arrears of rent for 1272, after notice of enhancement under s. 13, Act X of 1859, *Held*, that the intention was that after 1264 the rent should be fixed, and it was therefore not liable to enhancement.

In such a suit, if the enhancement be refused, a decree should not be given for arrears of rent at the rate agreed in the kabuliath.

APPEAL from a decision of the High

Court, Calcutta (Phear and Bayley, clearing lease of certain land, which it JJ.), dated the 3rd July 1868 (a),

(a) 9 W. R., 65.

*Present:—SIR J. W. COLVILLE, SIR B. PHACOOK, SIR M. E. SMITH, AND
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not taken in the Court below.] The objection was made in the Court below. It was the fourth ground of appeal that

reversing a decree of the Deputy Collector of Madareepore who had decided in favor of the plaintiff's right to enhance the rent of land held by the respondent.

Mr. Leith Q. C., and Mr. Bell, for the appellants, referred to Mohunt Gobind Ramanooj Dass v. Ajaital Bhukt (a), Taruck Chunder Nundee v. Modhoo Soodun Nundee (b), Puddo Monce Dossia v. Puromanund Sein (c), and Kasimuddi Khandkar v. Nudir Ali Tarafdar (d).

Mr. Field Q. C., and Mr. Doyne for the respondent.

The facts of the case are fully set out in the following judgment of their LORDSHIPS:—

The appellants are the executors and representatives of Gopal Lall Thakoor, deceased, who was the plaintiff in the suit below.

The suit was brought on the 12th July 1866, to recover the sum of Rs. 5,120 for arrears of rent for the year 1272 (1865-66), in pursuance of a notice of enhancement served under the provisions of a 13, Act X of 1859, together with interest thereon, amounting altogether to the sum of Rs. 5,613-13-10, with costs and future interest. The grounds of enhancement relied upon by the plaintiff were: 1st, that the value of the produce and the productive powers of the land had increased otherwise than by the agency or at the expense of the defendant; and 2ndly, that the quantity

of land held by the defendant was greater than the quantity for which rent had been previously paid by him. The excess as regards the quantity of land held by the defendant, and in respect of which enhancement was claimed, consisted partly of lands within the boundaries described in the kabuliat under which the defendant held, partly of lands subsequently added thereto by alluvion.

It is necessary to consider, 1st, whether the defendant is liable to enhancement; 2ndly, if liable, whether he was liable to be enhanced as a middleman or as a ryot; and 3rdly, if liable only as a middleman, whether he was liable to be enhanced in the manner and to the extent claimed by the notice.

The defendant produced a document purporting to be a potta executed by the plaintiff. It was contended on the part of the plaintiff, and found by the Deputy Collector, that the document was a forgery. Their Lordships are of opinion that the High Court was right in holding that it was not material to determine whether the alleged potta was a forgery or not, for a kabuliat, dated the 4th Bhadro 1260 (19th August 1863), signed by the defendant, was produced on the part of the plaintiff, and was admitted by the defendant to be a genuine document. That document shows the nature and terms of the defendant's holding. By that instrument,—after reciting that within the chur formed on the site of the old diluviated lands of the villages of Panchocottee and Chur Panchocottee

(a) S. D. A., 1859, p. 136.

(b) 5 W. B., Act X Rul., 80.

(c) 7 W. R., 158.

(d) 2 B. L. R., A. C., 265.

the rates claimed had been objected to, but no attention was paid to the objections. The position of the respondent as

&c., bounded as therein mentioned, there were about 8 drones, 6 kanees, and 8 gundas of jungle waste land fit for cultivation, for 8 annas whereof, viz. 4 drones, 3 kanees, and 16 cowries, the defendant had applied for a Lawal-dari amalnama, at a rate of rent of Rs. 5 per kanee, without any rent for the then present year 1260; at the rate of Rs. 1 per kanee for the year 1261; at the rate of Rs. 2 per kanee for the year 1262; at the rate of Rs. 3 per kanee for the year 1263; and at the full customary rate of Rs. 5 for the year 1264,—it was declared by the defendant that for 4 drones, 3 kanees, and 4 gundas of land within the boundaries therein mentioned the said Gopul Lal Thakoor had granted a haval-dari amalnama according to the prayer contained in the said application, and the defendant then agreed as follows:—

"We shall till and cultivate the 4d., 3k., 4g. of land, situate within the boundaries aforesaid, less rakba, at the rate of 4g. per kanee, viz., 1k., 4g.,—that is, 3d., 8k., and hold during the year 1260 without any rent, after which we shall continue to pay as rent according to the instalments mentioned below, year by year, and month by month,—in the year 1261, Rs. 56, being at the rate of Rs. 1 per kanee; in the year 1262, Rs. 112, being at the rate of Rs. 2 per kanee; in the year 1263, Rs. 168, being at the rate of Rs. 3 per kanee; and in the year 1264, Rs. 280, being at the full customary rate of Rs. 5 per kanee. We will not make any objections or excuses on the ground of drought, inundation, death of tenants, absconding of them, sandy land, fitness or unfitness for cultivation,

cultivated or not cultivated, and the like, and even if we do, they shall not be admitted. In the event of our making default in paying our rent according to the instalments, we will pay the arrear due with interest at the rate of Re. 1 per cent. per mensem on the lapsed instalments. Should we neglect to do so, the arrear will be realized with interest according to the law for the time being in force. After the month of Pous of the year 1261 notice of fifteen days will be issued to us from your office to file a kabuliat, specifying the quantity of land and amount of rent, according to measurement as per boundaries. In the event of our not attending before the Ameen, who may be deputed to make the measurement, and causing the measurement to be made, and the rent to be fixed, the measurement will be made in our absence, and whatever quantity of land may be found on measurement to be cultivated or fit for cultivation, we shall be taken to have accepted and engaged for, as part and parcel of this hawala; out of the same, the cultivated land in excess of the quantity mentioned above, less rakba, shall be charged with rent, which being added to the rent fixed at the rates mentioned above, we will pay from the year 1261. We will take a potta according to the practice of your zemindari office after executing a kabuliat, specify the total quantity of land measured, with the rent thereof, at the rates mentioned above and progressive rates, being exempt from the payment of rent for two years in respect of lands fit for cultivation, continue to pay rent according to the instalments and conditions

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a talookdor at a fixed rent is established by the deed of gift of the 27th Baisakh 1195. It was *ultra vires* of the Sudder

mentioned in the kabuliat. We shall not be able to make any excuse or objection thereto, and even if we do, they shall not be admitted. To this effect we execute this kabuliat, having received the hawaldari amalnama. Dated the 4th Bhadro 1260."

It was admitted on the part of the appellants that the defendant was entitled to a perpetual right of occupancy so long as he paid the rent which the appellants had a right to demand, but it was contended on their behalf that the rent was not fixed beyond the year 1204, and was therefore subject to enhancement after that date. The defendant was a middleman, and not a cultivator of the land. By the express terms of the kabuliat he was to have a hawaldari allowance at the rate of 4 gundas per kanees, and he agreed to make no objection or excuse in regard to the payment of rent on account of the death or absconding of tenants. Indeed it was admitted that the holder was a middleman, and not a cultivator of the land himself. In his judgment the Principal Sudder Ameen said:—"It is admitted that the holder is a middleman ryot," and he held that the tenure of the defendant was nothing more than a right of occupancy, and that he was liable to enhancement under s. 17, Act X of 1859. He said:—"The tenant or holder of such a tenure is, strictly speaking, a ryot with a right of occupancy, whether he cultivates the land himself or sublets to others, and is a middleman. For enhancement of such a tenure there is no other law but s. 17 of Act X of 1859, which is necessarily applicable; notice

under cls. 2 and 3 of s. 17 served on the defendants under s. 13 of the Act, is therefore valid at law." Having held that the rent was subject to enhancement, he proceeded to try to what extent it ought to be enhanced. There was a contest before him as to what quantity was within the boundaries specified in the kabuliat; but he considered it entirely immaterial, and held that all the cultivable lands, whether included within the boundaries or not, ought to be assessed at the same rate. He found that, instead of Rs. 5 per kanees (the plaintiff having claimed Rs. 16 by his notice), the rent ought to be Rs. 10-10; and after deducting the hawaldari allowance at the rate mentioned in the kabuliat, there were 16 drones, 10 kanees and 17½ gundas of culturable land fit for assessment, and that the jama, according to that rate, was Rs. 2,881-11-7. He held that the defendant, being a middleman, ought to have an allowance of 10 per cent. for collection. Deducting that allowance, he considered that the jama should be enhanced to Rs. 2,599-12-11, and gave the plaintiff a decree for the amount with interest.

Upon appeal from that decision, the High Court held that, according to the terms of the kabuliat, there was a grant from the plaintiff to the defendant of a permanent tenure at a fixed rate of rent, and that the plaintiff's suit ought to be dismissed.

Bayley, J., in delivering his judgment, said:—"It is impossible, I think, to read this kabuliat without coming to the conclusion, that the intention of the parties was that the lessee should clear and cultivate jungle waste on the

Court in a suit in which the only dispute was as to the amount of rent in arrears, to lay down a declaration of the

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terms of partly rent-free and partly progressive jama allowed in those cases (and not in the case of cultivated lands), and that the full customary rent of Rs. 5 per kanee from 1264 was thereafter to be paid. I cannot think it reasonable, or borne out by the deed, that the lessor intended to prescribe, or the lessee intended to accept, terms such as that the lessee should bear all the expense and trouble of reclamation, and having done so, was, in the first year after the full rent would be paid, viz., after 1264, to be liable to make over the reclaimed land to his lessor, or to have it in 1265 enhanced to the highest rates of neighbouring cultivated lands as to which no jungle waste had to be cleared."

The kabuliati did not contain the term "mukarrari," or the words "from generation to generation," or any word to that effect, and the kabuliati was one of modern date, and there was not, as in *Dhunput Singh's* case (a), any long uninterrupted enjoyment at a fixed unvarying rent. It was however admitted by both parties on argument that the tenure was a permanent one. It is unnecessary for their Lordships to express any opinion upon that point, and they therefore abstain from doing so. Looking at the words of the kabuliati, their Lordships are of opinion that it was the intention of the parties that in and after the year 1264 the defendant should hold at the fixed rent of Rs. 5 per kanee, and that consequently the rent was not liable to enhancement beyond that rate. It appears from the recital in the kabuliati that the defendant applied for a hawaldari

amalnama at the rate of Rs. 5 a kanee without any rent for the year 1260, and at varying rates less than Rs. 5 a kanee up to and inclusive of 1264, and that a hawaldari amalnama had been granted according to the defendant's prayer. The rent was to be payable by certain instalments, and the defendant agreed to pay it after 1260, years by year, and month by month, according to the instalments mentioned in the kabuliati. In applying for an amalnama at the rate of Rs. 5 a kanee it could not have been intended that the Rs. 5 should be the rent for the year 1264 only: it is a much more reasonable construction to hold that Rs. 5 a kanee was intended to be the rent for 1264 and during the remainder of the holding. The defendant, as a middleman, might be ruined if he were liable to have his rent enhanced in the manner contended for by the plaintiff. By the terms of the notice it was proposed to enhance his rent from Rs. 280, the amount fixed for the year 1264, to Rs. 5,120 for the year 1272. The notice was dated the 19th Cheyt 1271 (31st March 1865), and was served on the 25th or 26th, not many days before the end of that month. It does not appear what rent the defendant was receiving from his ryots, but he could scarcely have had time before the end of the month of Cheyt to serve his ryots with notices of enhancement for 1272 yet according to s. 13 any notice from him to his ryots to be available for 1272 must have been given before the end of Cheyt 1271.

Their Lordships are of opinion that the rent was not subject to enhancement beyond Rs. 5 a kanee. The

(a) 11 Moore's I. A., 433.

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plaintiff's right to assess at pergunna rates, as was done by the decree of the 30th April 1821. At all events as the semin-

Defendant might be liable under Regulation XI, 1825, cl. 1 of s. 4, to pay rent for the lands gained by alluvion: but this is not a suit merely to recover rent for those lands, or to assess them, but it is a suit to enhance the rent of the defendant, under s. 17, Act X of 1859, upon the ground that he was liable to enhancement under that section. The defendant was a middleman, and not a ryot having a right of occupancy within the meaning of s. 17, Act X of 1859, or liable to enhancement under that section. If liable to enhancement at all, he could only be enhanced according to the pergunna rate of the rent payable by similar holders; see *Dhunput Singh's case* (a) and the case there cited with approbation.

Their Lordships consider that this objection is fatal to the whole of the plaintiff's case. In *Dhunput Singh's case* (a) it was said:—"To assess an intermediate tenant according to the rent paid by ryots must necessarily deprive him of all beneficial interest in tenure." According to the tenure of the defendant in the present case, he was not to make any objection on the ground of "drought, inundations, death of tenants, absconding of them, sandy land, fitness or unfitness for cultivation, cultivated or not cultivated, or the like." He could not at any rate be liable to any higher rent than belders of tenures upon those terms.

In the present case, if the defendant was liable under cl. 3 of s. 17 to be assessed for land gained by alluvion beyond the boundaries mentioned in the kabuliati, upon the ground that the land held by him

had been found upon measurement to be more than that for which he had previously paid rent, he would be liable to pay rent for the land outside the boundaries mentioned in the kabuliati, even though it might be sandy or unfit for cultivation.

It was contended on the part of the appellants that, even if they were not entitled to enhance the rent, they were entitled to recover rent at the rate specified in the kabuliati. Their Lordships are of opinion that a suit to enhance is very different from a suit to recover arrears of rent at the rate originally fixed, and that it is founded entirely upon different principles. To a suit for enhancement it would be no bar to plead that all arrears according to the original rate had been paid. No issue was raised, nor could an issue have been properly raised, in this suit as to whether the rent for 1272 at the rate specified in the kabuliati had been paid or satisfied, nor is there anything in the case to show whether it has been paid or not. Their Lordships are of opinion that the plaintiff is not entitled to a decree in this suit for the rent of 1272 at the rate fixed by the kabuliati. They concur with the High Court in thinking that the present suit ought to be dismissed with costs, and they will therefore humbly advise Her Majesty that the decree of the High Court be affirmed with the costs of this appeal.

Appeal dismissed.

Agents for the appellants: Messrs. *Watkins and Lattoy*.

Agent for the respondent: Mr. *Wilson*.

(a) 11 Moore's I. A., 433.

dar did not exercise the power given by that decree, he must be taken to have waived it, in the same way as an auction-purchaser at a revenue sale is presumed to waive his option of setting aside under-tenures when he does not exercise it—*Ranee Surnomoyee v. Maharaja Sutteeschunder Roy Bahadoor* (1). If the declaration in the decree of the 11th December 1860 is good at all, it only amounts to a declaration that the rate of rent payable by the respondent is variable, not that it has varied. Consequently, that declaration does not bring the case within s. 15, Act X of 1859. In the judgment of the High Court it is said that the rate is admitted never to have been changed.

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Mr. Leith, Q. C., in reply.—The case of *Soorasoondery Dabee v. Gholam Ali* (2) differs from the present case. The Court held in that case that there was a grant of a permanent tenure at a fixed rate. In absence of a definite grant of that nature, the zemindar has a perpetual right in the land; see Regulation I of 1793. The rent fixed by a lease, but not declared to be invariable, may be enhanced—*Taruck Chunder Nundee v. Modhoo Soodhun Nundee* (3).

Their Lordships' judgment was delivered by

SIR B. PEACOCK.—This was a suit brought to recover rent at an enhanced rate after notice of enhancement for Taraf Oomedpore, a dependent talook comprised within the plaintiff's 3 annas 4 gandas share of the zemindari Pergunna Mahomedshahee, in Zilla Jessore. The suit was brought in the Revenue Court under Act X of 1859. The Collector who tried the case thought that the rent ought to be enhanced, and he decreed accordingly. He says:—

"The case has been pending since 1862, when the issues were first fixed after hearing the pleadings on both sides. I come to the conclusion that the only issue on which there is any dispute between the parties is that first laid down, viz., whether the provisions of

(1) 10 Moore's I. A., 123.

(2) *Ante*, p. 125.

(3) 5 W. R., Act X Rul., 80

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ss. 15 and 16, Act X of 1859, do not apply to the talook regarding the rents of which the present suit is brought, and whether the rent under these circumstances can be enhanced. Defendant's mukhtar admits the fairness of the pergunna rates assessed, but bases all his resistance to the paying of the enhanced rent on the principle above mentioned. I do not think there can be any doubt that the rent can be enhanced under the power conveyed in the two decisions above quoted," (referring to two decisions of the Sudder Court of the 30th April 1821 and of the 11th December 1860 respectively, which will be considered presently). The Collector proceeds :—

"It is distinctly laid down there that the rents of Talook Oomedpore may be enhanced by the plaintiff after issuing the notices required by law at the pergunna rates, and in the face of these decisions of the highest judicial authorities, I cannot see that the plea of defendant can for a moment be entertained. I accordingly reject it."

The case came on appeal before the High Court, who thought that the main question was whether, under the circumstances, the rent admittedly never having varied, the talookdar was not now protected by s. 15, Act X of 1859, and desired that the argument might be confined to this point, and having heard both parties upon it, were of opinion that, under the provisions of the 15th section of Act X of 1859, the defendant was protected from enhancement; and they decreed accordingly.

The present appeal is against that decision, and the question is whether the plaintiffs are entitled to enhance the rent in the manner in which they claim to enhance it. The notice of enhancement is this :—

"Be it known that in the 3 annas and 4 gandas share of Pergunna Mahomedshahes, our zemindari, the 37 mauzas with hudas, jalkar, &c., of Taraf Oomedpore, on a jama of Rs. 8,346-14-4 without settlement, and liable to increase or decrease, used to be recorded in the name of the late Babop Nil Comul Pal Chowdhry. On a survey of the lands of the said jama, the same has been shown to comprise 26,236 bigas and 8 katas of land: and after deduction of 1,041 bigas and 3 katas on account of ghair-laik (unculturable), khal khandak (ditches, &c.,) a net area of 25,196 bigas and 5 katas at the prevailing pergunna rate was assessed at

Rs. 36,001-11-8. And a notice having been served accordingly, and a suit No. 63 of 1855 brought for assessment of the said jama in the Court of the Principal Sudder Ameen of this zilla, on an appeal preferred by us, the Judges of the Sudder Court, on the 11th of December 1860 (referring to the decree in the former suit), declared that the said mehal was liable to assessment, in accordance with the decision of the Zilla Court, after service of notice. Therefore, as there is in your possession an excess of land on a deficient jama, and the productive powers of that land have increased, we consequently serve you with this notice, under the provisions of s. 13 of Act X of 1859, for the purpose of getting from you from the year 1269 the rents of 25,196 bigas and 5 katas out of 26,237 bigas and 8 katas of land, less 1,041 bigas and 3 katas of unculturable ditch, waste land, &c., comprised within the 37 mauzas and hudas, with jalkars of the aforesaid Taraf Oomedpore, by assessment thereof at the prevailing pergunna rates."

Therefore, the ground upon which the plaintiff seeks to enhance the rent is that there is in the defendant's possession an excess of land on a deficient jama, and that the productive powers of that land have increased.

Those are grounds, though not accurately expressed, upon which the rents of ryots having rights of occupancy are liable to enhancement under s. 17, Act X of 1859, but they are not applicable to a dependent talook like the present, which was created before the decennial settlement. Talooks of that description are protected by s. 51, Regulation VIII of 1793, from enhancement, except under the circumstances therein mentioned; see also s. 7, Regulation XLIV of 1793. The decree of the Collector, therefore, could not be supported even if the rent of the talook were liable to enhancement under the provisions of s. 51 of Regulation VIII of 1793.

It may, however, be well to consider whether the High Court was right in holding that the defendant was by s. 15 of Act X of 1859 protected from enhancement in any case and upon any grounds. S. 15 says:—"No dependent talookdar, or other person possessing a permanent transferable interest in land intermediate between the proprietor of an estate and the ryots, who, in the provinces of Bengal, Behar, Orissa, and Benares, holds his talook or tenure (otherwise than under a terminable

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lease) at a fixed rent which has not been changed from the time of the permanent settlement, shall be liable to any enhancement of such rent, anything in s. 51, Regulation VIII of 1793, or in any other law to the contrary notwithstanding." To bring the case within that section, he must hold his tenure otherwise than under a terminable lease, and he must also hold at a fixed rent, which has not been changed from the time of the permanent settlement. It should be remarked that s. 15 does not render liable to enhancement dependent talookdars who were exempted by s. 51, Regulation VIII of 1793, but exempts from enhancement, amongst others, dependent talookdars who, under the provisions of that section, might otherwise be liable to enhancement.

Now, the first question is, did the defendant in this case hold at a fixed rent? Proceedings which have been taken from time to time between parties who are represented by the parties in the present suit, the zemindar on the one side, and the owner of the talook on the other, have been put in evidence. The first decision to which it is important to refer is that of the 30th May 1811. That was a suit brought by Rajendro Deb Roy, the then talookdar, against, amongst other defendants, Kishen Mohun Bannerjee, who derived his title to the zemindari through a purchase at a sale in execution of a decree of the Supreme Court of Calcutta in the month of Sraban 1207 (July-August 1799,) and who also claimed Taraf Oomedpore under the same purchase. The plaintiff claimed the talook under a gift from his father, the former zemindar, dated the 27th Baisakh 1195 (6th May 1788), before the date of the sale in execution. The Zilla Judge, acting upon the bill of sale of the Supreme Court, dismissed the plaintiff's suit. The plaintiff thereupon appealed to the Provincial Court of Calcutta, and filed the deed of gift from his father, dated the 27th Baisakh 1195. The case was heard in the first instance by the Second Judge, who held that although Kishen Mohun Bannerjee purchased the zemindari rights of the former zemindar, yet the talookdari rights of the appellant could not be destroyed, and under those circumstances it was his opinion that the decision of the Zilla Judge was wrong and should be reversed, and that the appellant should

pay to the respondent the rents of the talook as he did to the former zemindar at the rates of the tahut of the decennial settlement. The case afterwards came up in the Court of the First Judge, who agreed with the Second Judge, and a decree was accordingly passed as follows :—

“ The First and Second Judges, having agreed in their judgment that the decision of the Zilla Court should be reversed, and that Talook Taraf Omedpore be declared as the right of the appellant in the manner of a mofussil talook, therefore it was ordered that the decision of Mr. James Devienne Thourne, acting Judge of the Civil Court of the above zilla, dated the 21st of March of the year 1808, be reversed and set aside; and that the appellant, having been put and maintained in possession of the taraf aforesaid, do pay the rents thereof to the respondent Kishen Mohun Bannerjee, in accordance with the amount laid down in the tahut of the decennial settlement, which the appellant used to pay to the former zemindar.”

Now the rent is there treated as a fixed rent, which the defendant talookdar used to pay to the zemindar.

That decree having been passed in the year 1811, a suit was commenced on the 17th September 1812 by the then zemindars, Petumber Ghose and Kishen Mohun Bannerjee, against Mohesh Chunder Deb Roy, minor son of Rajendro Deb Roy, and against Ramender Deb Roy, guardian of the above minor, in the Court of Zilla Jessore, for the recovery of Rs. 1,443-3-12, alleged to be due for arrears of rent, upon the following allegation, *viz.* :—

“ That having purchased the 3 annas 4 gandas share of Pergunna Mahomedshahee, &c., the zemindari of Gobind Deb Roy, they went on paying year by year the sum of Rs. 9,268-2-1, the jama of the above. That on the 30th of the month of May of the year 1811 A.D. by a decision of the Judges of the Provincial Court, the talooks aforesaid were decreed as the right of Rajendro Deb Roy as his mofussil talook. After the death of the aforesaid, the defendants had possession, and when we called for from them the sum aforesaid, being the jama as per tahut, which was the proper rental, they, out of the jama of the decennial settlement, acknowledged only the sum of Sa. Rs. 7,825-4-8-1. But as out of the total of jama claimed, after deduction of the amount of jama acknowledged by the defendants, a sum of Rs. 1,443-3-13 remains due, we therefore institute a miscel-

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laneous suit in the Zilla Court for the recovery of the rent at the rates of the decennial settlement."

This appears from the decree of the Sudder Court of the 30th April 1821. It also appears from the said decree that, on the 23rd of December 1813, the acting Judge of the Zilla Court, on all the grounds stated in his decision, and in accordance with the decision of the Provincial Court, dated the 30th of May 1811, already referred to, ordered.

"That the said suit be decreed, and that the defendants were to pay to the plaintiffs year by year the sum of Rs. 9,268-8 as the rents of the said talook."

The defendants preferred an appeal to the Provincial Court, and that Court, in accordance with a judgment of an appointed Judge of the Court that the former owner of the zemindari had before the decennial settlement made over the talook at a yearly jama of Rs. 7,825-4-8-1, ordered

"That the decision of the acting Judge of Zilla Jessore, dated the 23rd of December 1813, be reversed and quashed, and that the costs of both Courts be borne by the respondents."

The case came before the Sudder Court on special appeal from the Provincial Court. In their decree dated the 30th April 1821 they state that, amongst other documents,

"Two papers were put in, viz., on the part of the plaintiffs, a dawl of the decennial settlement for the year 1197, showing the jama of Taraf Oomedpore at the sum mentioned in the plaintiffs' plaint; and, on the part of the defendants, a hastabud paper of the year 1197, showing a decrease of the jama recorded in the hiba, and fixing it, after deduction of improper abwabs, at the sum of Rs. 7,631."

They then proceed :—

"In the opinion of this Court, after examination of those two documents, they are held to be unworthy of credit or reliance, because the document filed by the plaintiff, being alleged to be a document from the Collector's office, does not bear the signature or initials of any Government officer, and although on the second document there appear to be the initials of the Collector's name, yet his name is not even mentioned in the said hastabud, and therefore none of those documents appear sufficient to determine the amount of jama on the tahuts of the settlement of that year. In short, the amount of jama of the disputed talooks, as alleged by both parties, has not been proved

by them before this Court; and the decision of the Provincial Court as to the amount it maintains for those talooks by rejecting the claim of the plaintiffs should be confirmed, as the parties do not agree as to the amount of jama of those talooks between them; under those circumstances, for the purpose of putting an end to quarrels and disputes between the parties, suits have been instituted for a very long time, that is, from the time of institution of the old suit and of the new one, about the jama of the disputed talooks in the Zilla and in this Court. The order of the Court is that the jama of Talook Oomedpore be fixed according to pergunna rates, and in accordance with the rules laid down in s. 8, Regulation V of 1812."

Not that the jama shall be enhanced, but that there being a dispute between the parties as to what was the amount of the jama, it shall be fixed according to pergunna rates, &c. They thought that it ought to be paid according to pergunna rates, because they could not ascertain what was the actual amount of the rent; but they did not assess the rent or fix by their decree the amount to be paid for arrears; nor did they order the rent to be enhanced. The suit was not for the purpose of enhancing the rent, but a miscellaneous suit for recovering arrears. This Committee has already pointed out in a former case of *Gopal Lal* (1), which was cited in argument, that there is a great distinction between a suit to enhance and a suit to recover arrears. They there say:—"Their Lordships are of opinion that a suit to enhance is very different from a suit to recover arrears of rent at the rate originally fixed, and that it is founded entirely upon different principles. To a suit for enhancement it will be no bar to plead that all arrears according to the original rate have been paid."

The zemindar, acting upon that decision of the Sudder Court, subsequently brought a suit to enhance the rent. We have not the decree of the Court, but we have a reference to it in the 22nd volume of the printed decisions of the Sudder Court (2) of the 11th of December 1860. The Court says:—

"This suit was brought to enhance the rents of Talook Oomedpore, upon a given measurement and pergunna rates, on the averment that the said talook constituted an under-tenure, comprised in the plaintiff's 3 annas 4 gandas share of Taraf Mahomedshahee, purchased

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(1) *Soorasoodery Dabee v. Gholam Ali*, ante, p. 125.

(2) S. D. A., 1860, Part ii, p. 329.

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by him at an auction-sale, held by order of the Master in Equity of the Supreme Court."

It is to be observed that it was purchased, not under a sale for arrears of revenue, but in execution of a decree. Then they proceed to state what the different contentions were, and they finally come to this conclusion:—

"As then it is evident that Gobind Chunder Dutt, who purchased the right of Issarchunder, the mortgagee proprietor, is entitled to be regarded as talookdar of the entire taraf of Oomedpore, and as it is nowhere pleaded that notice of enhancement has been served upon him, the decree in plaintiff's favor giving him the authority to assess must be subject to plaintiff's serving the notice required by the law. The present order, therefore, will, under the peculiar circumstances of the case, merely be to the recognition of plaintiff's right to assess after proper service of notice on the proper parties."

Probably they used the word "assess" instead of "enhance," and intended to declare that the plaintiff had a right to enhance upon service of the proper notice. After that decision had been pronounced, an application was made to the Court to review their judgment. The Court says:—

"Now it is urged through the present petition, and it is objected in Court, that if the decree of the year 1821 confers on the plaintiff the power to assess, the contention now arises, what rate is the plaintiff entitled to obtain on such re-assessment of the rental. It has been urged that in the case decided in the Sudder Court in the year 1821, the former owner in that case had merely based his right for assessment at an increased rental on the following grounds, that the rents of the said lands should be of an amount equal to the amount of sudder jama of the zemindaris, that is, that it should be Rs. 9,400, and the talookdar had pleaded in reference thereto that he could remain in possession on the mukarrari (fixed) rental of Rs. 7,400; consequently, in the above suit the only point at issue was whether the owner of the property could enhance the rent to Rs. 9,400, or whether the talookdar was entitled to remain in possession on the jama of Rs. 7,400."

Then they say:—

"Mr. Peterson now asks that an enhancement be decreed in our decision, in accordance with the increase granted in the old suit. Our judgment is, that as the Court had merely decided that the plaintiff could enhance after service of the necessary notices on the tenants, and therefore, the present contention as to the amount of enhance

ment which will have to be fixed in accordance with other rates as above mentioned, belong to another subject. And after service of the notice above mentioned upon the tenant, it will then be time to decide that question."

Therefore the Court, proceeding on the decree of 1821, declared that the plaintiff was entitled to enhance, but refused to decide to what extent the enhancement could be made, and left that question, involving the construction of the decree of 1821, open for decision after notice of enhancement should have been served.

Now, it does not appear that either after the decree of the 30th April 1821, or after that of the 11th December 1860, the defendant or those under whom he claims ever paid a higher rent than Sa. Rs. 7,825 odd, or 8,346 odd, the corresponding amount in Company's rupees or that the plaintiffs, or the zemindars under whom they claim, ever obtained a decree for arrears assessed at a higher rate; on the contrary, it appears that after the decree of 1821, and before that of December 1860, *viz.*, on the 22nd March 1827, a farmer of the zemindari sued for and obtained a decree against the talookdar for arrears of rent at the rate of Sa. Rs. 7,825 odd, the jama which he stated was acknowledged by the talookdar. In his plaint in that suit he says the talook was the talook of Rajendro Deb Roy; that "after his death Mohesh Chunder Roy, having come into possession by right of inheritance, without any settlement as to the jama, used to pay me the sum of Rs. 7,825-4-8½ as the yearly rental acknowledged by him." On the 19th August 1847 a similar decree for arrears was obtained, the jama of the talook being stated to be Co.'s Rs. 8,346-15-4. On the 31st March 1848 there was a similar decree for arrears recovered by the zemindar, who in his plaint, stated that the talook was recorded in the name of the defendants, liable to increase or decrease, at the rent of Co.'s Rs. 8,346-15-4. Numerous other decrees were obtained by the zemindars against the talookdars for arrears of rent between 1826 and 1860, either at the rate of Sa. Rs. 7,825 odd, or at the corresponding rate of Co.'s Rs. 8,346 odd.

It appears, therefore, to their Lordships that there was

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ample evidence, independently of any presumption arising under Act X of 1859, s. 16, to 'prove that the talook was held at a fixed rent, and that such rent had not been changed from the time of the permanent settlement. The rent was not changed by the decree of 1821 ; for whether right or wrong, it at most amounted to a declaratory decree that the jama should be fixed at pergunna rates, or, according to the construction put upon it by the decree of 1860, that the plaintiff was entitled to enhance. The rent never was assessed at pergunna rates, and never was enhanced. Besides, there is the statement in the judgment of the [High Court that the rent had admittedly never varied.

We have been referred to the case of *Nufferchunder Paul Chowdhry v. Poulson* (1), decided by this Committee on the 24th January 1873. It appears to their Lordships that that is quite a different case from the present. That was the case of a mukarrari tenure, and it was proved that it was created as late as 1824. Their Lordships say:—"It should be stated that this suit was decided before Act X, to which reference has been made, came into operation. The state of the law then was that he could defend himself by showing an ancient tenure going back twelve years before the decennial settlement ; but he made no case of the kind. He made a case of mukarrari tenure established by pottas in 1824." The fact that those pottas were created in 1824, long since the time of the permanent settlement, rebutted the presumption that the tenure had been held from the time of the permanent settlement.

Our attention has been called by the learned counsel for the appellant to the following paragraph in the judgment in that case:—"In their Lordships' opinion the defendant did establish that the rent at which the talook was held had not been changed for a period of twenty years before the commencement of this suit, and that he thereby cast upon the plaintiff the burden of showing 'the contrary' (in the words of the Act), or that the rent had been fixed at some later period ; and their Lordships are of opinion that the plaintiff has succeeded in proving that which was cast upon him to prove." But that opinion merely

(1) 12 B. L. R., 53.

goes to the effect that proof that the pottas were created subsequently to the permanent settlement rebutted the presumption created by the 16th section of Act X of 1859, that the tenure had been held at a uniform rent from the time of the permanent settlement.

It should be remarked that a rent may be a fixed rent, though liable under certain conditions to be enhanced. That position is fully borne out by s. 15, Act X of 1859. The section does not merely say that the tenures therein described shall not be liable to enhancement "if held at a fixed rent," but "if held at a fixed rent which has not been changed from the time of the permanent settlement." If the mere fact of holding at a fixed rent was a bar to enhancement, the section would have been unnecessary. The term "fixed rent" in that section cannot mean a rent so permanently fixed that it cannot be enhanced under any circumstances.

It is unnecessary to determine what would have been the effect of the decrees of 1821 and 1860, so long as they were unreversed. If Act X of 1859 had not been passed. Their Lordships concur entirely with the High Court that the effect of those decrees did not put the plaintiffs in a better position than other landlords who, previously to the passing of Act X, had a good right to enhance, but whose right, if not exercised from the time of the permanent settlement, was taken away by the 15th section of that Act.

Upon the whole, their Lordships are of opinion that the High Court came to a correct conclusion in holding that the rent was not liable to enhancement, and they will humbly recommend Her Majesty that the decree of the High Court be affirmed, and the appeal dismissed with costs.

There is another appeal which was consolidated with this. The recommendation to Her Majesty will be the same in both cases. The appellants will pay the costs of both appeals.

Appeals dismissed.

Agent for the appellants: Mr. T. L. Wilson.

Agents for the respondent: Messrs. J. H. and H. R. Henderson.

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APPELLATE CIVIL.

Before Sir Richard Couch, Kt., Chief Justice, and Mr. Justice Ainslie.

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January 8. MOHIMA CHUNDER ROY CHOWDHRY (PLAINTIFF) v. RAM KI. SHORE ACHARJEE CHOWDHRY AND OTHERS (DEFENDANTS).*

Hindu Widow—Sale for arrears of Rent—Personal Decrees against Widow—Rent accruing after Husband's Death—Beng. Act VIII of 1869—Estoppel—Remand.

In execution of a decree in a suit under the provisions of Reg. VIII of 1831 against a Hindu widow for arrears of rent of a certain talook, the interest of the widow in another talook was sold in 1852 under Act IV of 1846; and in execution of another decree on a bond given by the widow for arrears of rent a third talook was sold in 1865. Both decrees were for arrears of rent which had accrued due after the death of the husband; and the suits were brought against the widow alone, the reversioner not being made a party. In a suit by the purchaser of the talooks from the reversioner against the purchasers at the execution sales to recover possession of the talooks, *held* that the plaintiff was entitled to recover. The decrees for arrears of rent were a personal debt of the widow, and not a debt against the estate of the deceased husband. Such decrees can be enforced by the sale of her interest only, except where the proceeding is one which authorizes the sale of the tenure under Beng. Act VIII of 1869. Even assuming them to be a charge on the husband's estate, the onus was on the defendants to prove that such charge was created by legal necessity, which they had failed to do.

Held also that where parties allow a suit to be conducted in the lower Courts as if a certain fact was admitted, they cannot afterwards, on special appeal, question it, and recede from the tacit admission.

THE plaintiff sued, as vendee of one Umbica Churn, to obtain possession of certain talooks, on the ground that by the sales which had taken place during the lifetime of Kantishuree, a Hindu widow, only her own life-interest in the property had passed. Umbica Churn being the person entitled to succeed to the property on her death as the next heir to her deceased husband Chundi Proshad.

The sales in question were made in execution of decrees. The

* Special Appeal, No. 510 of 1874, against a decree of the Judge of Zilla Mymensingh, dated the 16th December 1873, affirming a decree of the Additional Subordinate Judge of that district, dated the 17th of March 1873

first sale was on the 5th of July 1852 upon a decree made in a suit under the provisions of Regulation VIII of 1831 for arrears of rent due in respect of a talook other than that which was sold, and the interest of the widow was sold under Act IV of 1846. The second sale was on the 7th of August 1865 in execution of a decree in a suit on a bond given by the widow on account of arrears of rent.

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The defendants, among other things, contended that as they had purchased the talooks at public sales under decrees for arrears of rent, the plaintiff was not entitled to claim the property.

The Court of first instance decided that by the sales not only the interest of the widow but the property itself passed, and dismissed the plaintiff's suit.

On appeal, the Judge observed that the lower Court ought to have tried the question whether there was legal necessity on the part of the widow to incur the debts for which the sales were made, and referring to the ruling in *Teluck Chunder Chucker-buty v. Muddon Mohun Brahmin Joogee* (1), he said that that

(1) *Before Mr. Justice Dwarkanath Mitter and Mr. Justice Hobhouse.*

The 11th December 1869.

TELUCK CHUNDER CHUCKER-BUTTY (DEFENDANT) v. MUDDON MOHUN BRAHMIN JOOGEE AND ANOTHER (PLAINTIFFS).*

Hinda Widow—Sale for Arrears of Rent—Widow's Rights and Interests—Misjoinder—Objection taken for first time on Special Appeal.

Arrears of rent due to a semindar by a Hindu widow in possession of her husband's property are not a personal debt of the widow; and on a sale of the property taking place in execution of a decree against the widow for such arrears, in a suit under Act X of 1859, the purchaser acquires the property absolutely, and not merely the rights of the widow.

THE plaintiffs sued as heirs of one Mohesh Chunder Jogee, their maternal uncle, to recover certain parcels of land, which were in the possession of Ooday Tara, the widow of Mohesh Chunder. The defendants, among other things, stated that 4 annas of the property had been sold by Mohesh Chunder himself to the first defendant, from whom Taransauth Paulit, one of the defendants, had purchased it; further, that the rest of the property had been sold in execution of decrees, some of which it appears were decrees for debts, and some for arrears of rent, against Ooday Tara, the widow, and Ram Doorga and Nobo Doorga, the sisters of Mohesh Chunder and mothers of the plaintiff, among whom, by an ikrarnama, the property had been divided in certain shares.

* Special Appeal, No. 1812 of 1869, against a decree of the Officiating Additional Judge of Zilla Backergunge, dated the 10th May 1869, reversing a decree of the Sudder Ameen of that district, dated the 19th March 1869.

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" judgment lays it down broadly that rent due cannot be regarded as a Hindu widow's personal debt." He accordingly dismissed the appeal.

The first Court decreed the claim of the plaintiffs,—except as to a portion of the property which had been purchased by one of the defendants at a sale in execution of a decree for rent, under Act X of 1859,—holding that the sale by Mohesh Chunder to Tarasanth Paulit had not been proved; that the widow had no right to part with the property or divide it with the mothers of the plaintiffs; and that the sales in execution of the other decrees could only affect the rights of the widow and the sisters of Mohesh.

From this decision, both parties appealed. The Judge dismissed the appeal of the defendants, agreeing with the first Court in the reasons given for its decision, and holding that sales under the decrees were invalid, unless necessity was shown for the debts, for which the decrees were passed.

The defendant Teluck, who had bought part of the property from a purchaser at a sale under a decree for rent, appealed from the Judge's decision on two grounds: first that there was misjoinder of parties; secondly, that the sale being under a decree for rent, the purchaser acquired the property itself, and not merely the rights of the widow.

Baboo Ashootosh Chatterjee, Amersendro Nath Chatterjee and Jadub Chunder Seal for the appellant.

The respondents did not appear.

MITTER, J.—On the first point taken by the pleader for the special appellant, we are of opinion that misjoinder of parties is not an objection which can be allowed to be taken at this late stage of the proceedings.

As to the second point, we think the contention of the special appellant is right. The zemindar obtained a decree for arrears of rent against the maternal aunt of the plaintiff, special respondent, who was then in possession of the estate as the legal heir and representative of her husband Mebeah Chunder, and in execution of that decree the properties which form the subject-matter of this special appeal, namely, a 7-anna share of plot No. 17 and plot No. 25, and a 3 annas and 15 gundas share of plot No. 22, were put up to sale, under the provisions of Act X of 1859, and purchased by the vendor of the special appellant. The lower Appellate Court seems to be of opinion that the effect of this sale was merely to transfer to the special appellant's vendor, the life-interest which the widow possessed in the tenure. We think that this opinion is erroneous. The rent due to the zemindar cannot under any circumstances be treated as a personal debt of the widow; and if the zemindar thought it proper to put up the properties now in dispute for sale for the realization of that rent, after having obtained a decree for it in due course of law, the reversionary heir can have no right to come in after the death of the widow, and take back those properties from the hands of the purchaser. If the widow had contracted a debt to meet the zemindar's demand for rent, and then alienated a part of her husband's estate, for the satisfaction of that debt, the alienation would have been good and valid in law, and we do not see any reason why less effect is to be given to a decree passed by a Court of competent juris-

From that judgment, the plaintiff preferred a special appeal. Mr. Evans (with him Baboo Mohesh Chunder Chowdhry) for the appellant.

Baboo Doorga Mohun Dass for the respondents.

Mr. Evans.—The decrees under which these properties were sold were personal decrees against the widow, therefore nothing passed by the sale but the interest of the widow. One decree was on a bond for money borrowed for rent that accrued after the husband's death. It was held by Mitter, J., in *Teluck Chunder Chuckerbuddy v. Muddon Mohun Brahmin Joogee* (1) that a sale under a decree for rent passes the estate: but there are special provisions by which the tenure itself may be brought to sale. In that case the decree may have been of that nature. A Hindu widow does not represent the estate of her deceased husband so as to bind the reversioners. If she allow the rent to fall into small arrears and then borrow, there is no "legal necessity." So in *Brijhookun Lall Awustee v. Mahadeo Doobey* (2), Ainslie, J.,

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diction in execution of which decrees certain properties belonging to the estate of the widow's husband were brought to sale and purchased by the special appellant's vendor.

Holding this view of the case, we are of opinion that the decision of the lower Appellate Court, so far as it relates to the properties mentioned above, must be reversed, and that of the first Court restored, with costs of this appeal and the costs of the lower Appellate Court.

(1) *Ante*, p. 143.

(2) *Before Mr. Justice Loch and Mr. Justice Ainslie.*

The 22nd March 1872.

BRIJHOOKUN LALL AWUSTEE
(PLAINTIFF) v. **MAHADEO DOOBEY**
AND OTHERS (DEFENDANTS).*

*Hindu Law—Maintenance of Widow
Charge on Estate of Husband—
Estoppel.*

A Hindu died leaving two sons, S and M, who became separate in estate. S died, leaving a son, K, who became a lunatic. M died, leaving a widow, N and two sons, B and C; and on his death, his sons B and C took possession of their father's estate, and entered into an agreement with their mother N to pay her Rs. 200 per annum for maintenance, and hypothecated some villages as security for due payment. B died, and C remained in exclusive possession of the property. After the death of C, his widows, K and D, and afterwards D alone, took possession of the estate. N sued B for arrears of maintenance accrued since the death of C, and obtained a decree. In execution of that decree, she attached the rights and interests of D in certain properties, but shedied before any sale took place. The plaintiff, the son of K, then obtained a certificate under Act XXVII of 1860 as representative of N. He was appointed a guardian of K, who was, in a suit brought by him before his insanity and before the death of N, declared, by a decree made in 1848, entitled to the estate of C as reversioner. The plaintiff executed the

* Regular Appeal No. 180 of 1871, against a decree of the Subordinate Judge of Zillah Gya, dated the 13th June 1871,

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held there was nothing to show that it was not a personal liability of the widow. He cites *Nugenderchunder Ghose v. Sreemutty*

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decree obtained by N, and caused the properties, which had been before attached, to be sold in 1866. Some time after D died, and the plaintiff then sued the purchaser to recover possession of the property as the representative of his father under the decree of 1848, but was defeated on the ground set up by the defendants, the purchasers, that his father was no longer heir to C, by reason of supervenient insanity when the succession opened on to him on the death of N. The plaintiff then brought this suit to establish his own title to the property as heir of C. It was contended by the defendants, among other things, that K was not disqualified by his insanity, inasmuch as it was not congenital, and also, that by the sale in execution in 1866, under the decree obtained by N against D, the absolute proprietary title passed and not the life-interest of the widow only:

Held, that the defendants having in the previous suit set up the defence that K was disqualified, by insanity, and taken the decision of the Court on that ground, were estopped now from setting up the defence that he was not so disqualified, and that he was entitled to succeed.

Held also, that the arrears of maintenance for which the sale in 1866 took place was the personal debt of D, and that nothing but her life-interest passed under the sale.

Mr. Woodroffe (Mr. C. Gregory, and Baboos Mohesh Chunder Chowdhry and Unnoda Persad Banerjee with him) for the appellant.

Messrs. Allan and R. E. Twidale Baboos Sreenath Dass, Chunder Madhub Ghose, and Mohini Mohun Roy for the respondents.

THE facts of the case are stated in the judgment of the Court, which was delivered by

AINSLIE J.—This is a suit to establish the plaintiff's right to certain villages, included in Lot Moranwan, as

heir of his cousin Chintamun Awastee.

The property in suit, with other properties, formerly belonged to Deekishen Awastee (a), who died leaving two sons, Shew Churn and Muddon Mohun, who became separate in estate. Shew Churn died leaving a son, Kanyalall, who is still living, but is a lunatic. The plaintiff Brijbhokun is the son of Kanyalall. Muddon Mohun died leaving a widow Net Koowur and two sons, Balgebind and Chintamun,—these two lived in commensality, but have both died childless. On the death of Balgebind, his brother took the whole of their father's estate, and died leaving two widow, Radhe Koowur and Doorga Koowur, Radher Koowur died in 1267 (1859-60), and Doorga in 1277 (1869-70).

By an agreement between Net Koowur and her sons, the sum of Rs. 200 per annum was fixed for her maintenance, and the same agreement (which is not in the record) apparently contained a hypothecation of three villages, Bheekunpore Kaur, Gobindpore Kaur, and Sewa, as security for the due payment of this allowance; this is gathered from the plaint filed by Net Koowur in the suit to be noticed hereafter and from the fifth paragraph of the written statements of Huree Singh and Bechun Doobey, defendants in this suit.

During the lifetime of Chintamun, Net Koowur's allowance fell into arrears, and she had occasion to sue him for those arrears, and caused several house properties to be sold in execution of decrees obtained by her; it also appears that on one occasion

(a) In the report of *Braja Bhukan Lal Ahusti v. Bichan Dobi*, 9 B. L. R., 204, note, will be found a genealogical table of the family.

Kaminee Dossee (1), in which also it was held that the decrees there mentioned were personal decrees. When by the proce-

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Chintamun sold one of his villages, Mauza Birnee, and paid Net Koowur some arrears, then due to her, out of the proceeds; but it is admitted that at his death he was not in debt to his mother on account of this allowance. After his death, and when the ancestral estates where in the hands of the widows, arrears again accrued, and finally after the death of Radhe Koowur, when Doorga Koowur was in sole enjoyment of the estate, Net Koowur instituted a suit against her, and obtained a decree for something between Rs. 1,300 and 1,400. In execution of this decree Net Koowur attached Lot Moranwan, and applied for the sale of the rights and interests of Mussamut Doorga Koowur therein, but at this stage of the proceedings she died and the execution suit dropped. After a contest, Brijbhookun was declared to be entitled to a certificate under Act XXVII of 1860 as representative of Net Koowur.

Before following that suit any further, it is necessary to revert to a suit instituted by Kanyealall, father of the plaintiff, in 1847. In this suit Kanyealall on the 13th April 1848 succeeded so far that he obtained a decree declaring him entitled to the estate of Chintamun, as reversioner, after the decease of both the widows. Subsequently, but before the death of Net Koowur, Kanyealall became insane, and his son, the plaintiff, was duly appointed guardian and manager of his estate.

The decree obtained by Net Koowur against Doorga Koowur having, as related above, come into the hands of the plaintiff, he in 1866 applied to

renew the execution thereof by proceeding against the properties previously attached by Net Koowur, and accordingly a sale was effected on the 13th June 1866, at which Bechun Doobey was recorded as the purchaser for a sum of Rs. 5,535. About three and a half years after this, Doorga Koowur died, and the reversion opened out. Brijbhookun then attempted to obtain possession of Chintamun's estate under the decree of 1848 as representative of his father. He was met by the auction-purchaser by the plea that although Kanyealall was the next heir to Chintamun in 1848 when the decree was made, he not having at that time become insane, yet when the succession opened out he was no longer an heir at all under Hindu law, in consequence of supervenient insanity, and that the plaintiff as representing one who had ceased to have any right, could not execute the decree. This Court in *Braja Bhukan Lal Ahusti v. Bichan Dohi* (a), held that the contention was good, and affirmed the order of the Court below which refused to allow Brijbhookun to enter on Chintamun's estate by executing his father's decree. The plaintiff was thus thrown back on a regular suit to establish his own title as heir to Chintamun on the death of Doorga Koowur the last surviving widow. Hence this suit.

In his plaint, the plaintiff alleges that the decree obtained by Net Koowur was a decree against Mussamut Doorga Koowur personally, and that in execution thereof, he sold the life-interest

(1) 11 Moore's L. A., 241.

(a) 9 B. L. R., 204, note.

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dure the tenure itself is to be sold there is necessity; but in other cases the debt is of a personal nature. [COUCH, C.J.,

of that lady; and he further alleges that she herself bought in the property in the name of her servant Bechun Doobey.

The right of the plaintiff as heir to Chintamun is disputed on the ground that his father is not disqualified by insanity which was not congenital. It is also contended that what was purchased at the execution-sale was the absolute proprietary title in Lot Moranwur, and not the widow's life-interest, and that Bechun Doobey was not a nominal purchaser account of Doorga Koowur; that the 260th section of Act VIII of 1859 bars the plaintiff opening up the question whether Bechun's purchase was real for his own benefit or nominal for the benefit of Doorga Koowur, and that the plaintiff cannot impugn the dealings of the defendant Ilunee with Bechun, such dealings having been carried on *bona fide* with the ostensible owner of the estate.

The judgment of the Court below was in favor of the plaintiff on the first point, and against him on the others. The respondents have objected under s. 348 to that part of the judgment which is against them, so that the whole case is before us.

The first point to be disposed of is the right of the plaintiff to bring this suit. It is admitted that either the plaintiff himself or his father is the heir of Chintamun, now that the reversion has opened out. The plaintiff is the legal representative of his father. Should his father recover the use of his reason, a question might arise whether he or his son was entitled to take the inheritance on the death of Chintamun, but in the meantime there can be no doubt that the

plaintiff and the plaintiff only is the person who is entitled to the occupation of the estate. It is not contended that the form of the suit has in any way prejudiced the defendants; and I should find it very difficult to hold that the suit ought to fail even if plaintiff is not the heir under the Hindu law. But independently of this, it is clear that the defendants are estopped from raising the plea by their own acts. Rightly or wrongly, they insisted in the former proceeding that Kanyealall's right was barred by insanity, and they obtained a decision of this Court in their favor (a decision which it is not my intention to question in any way), and they are bound by that decision. They cannot be allowed to come into Court and plead one defense, and then, as soon as they have succeeded in that and forced the plaintiff to take up the position which they then assigned to him, turn round and say he ought to go back to his former place: they took a decision of the Court on the point and for all purposes connected with this litigation they must be bound thereby.

The next question is what passed by the sale of the 19th June 1866, the limited interest of the widow, or the absolute interest as it existed in the hands of Chintamun. This question is sub-divided into two branches: 1st, whether in fact the sale was intended to be a sale of more than the life-interest; and 2nd, whether in law irrespectively of the intentions of the decree-holder it did operate to convey the absolute estate.

It seems to me that there is no room for doubt as to the intentions of the person at whose instance the sale was held. He was the personal representa-

Mitter, J., goes so far as to say that if a widow borrows on a bond to pay rent, that bond is a debt against the whole estate.]

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tive of Net Koowur, and as such had an interest in recovering from Doorga Koowur, who held the estate of Chintamun for her life, the money for which she had become liable as such life-tenant, but he was also the reversionary heir to whom the property was to come immediately on Doorga Koowur's death.

It has been contended that he took the place of Net Koowur, and must be held to have executed the decree precisely in the same manner as she would have executed it in, and the fact that he asked to proceed on her application is pointed to. But that application, though, by reading it in connexion with matters not included within the paper itself, it may possibly be construed as containing a prayer for the sale of something more than the personal interest of Doorga Koowur, certainly does not on its face show that there was such a prayer in it. It asks for the sale of the rights and interest of Doorga Koowur: if, when presented by Net Koowur, we are to suppose that under this expression, she wanted to attach the reversion, surely we cannot hold that, when presented by the reversioner himself, it was intended to do so. Unless we take Brijbhookun to be of as weak intellect as his father, we cannot suppose him to have intended to sell his own interest to pay himself. That he knew what he was doing is manifest from his conduct on the day of sale, when in his application to be allowed to bid and to set off his claim against the purchase-money should the property be knocked down to him, he distinctly speaks of the subject of the sale as the life-interest of Doorga Koowur.

The petition itself is not forth-

coming, but evidence has been given to show that it has been destroyed in the ordinary course of business, and the purport of the petition is proved by the vakalutnama of the 18th June 1866 appointing the vakeel by whom it was presented, and by the examination of the plaintiff himself. It is objected that if the petition was destroyed, the vakalutnama would also have been destroyed; and the uncertain nature of the first few answers of the vakil Mohabeer Pershad are pointed to as indication of the want of genuineness of this paper. It is true that the vakil does not speak very positively about the sale, but when the vakalutnama bearing his signature was put into his hands, he identified it at once. This paper came from the records of the Court, and contains a memorandum of the date on which it was filed (viz., 18th June 1866), signed apparently by some officer of the Court, and if the defendants intended to charge the officers of the Court with substituting the paper produced for another paper not originally on the record, or with allowing a fabricated record to be placed with the genuine records, they should have pursued their enquiry further. On the evidence now before us, we can, I think, come to one conclusion only, namely, that there is nothing to warrant the rejection of the vakalutnama as spurious. Even without this evidence and looking merely to the position of the party executing the decree, I could not persuade myself that he intended to sell anything more than the personal interest of the debtor.

This brings me to the second branch of the question, on which

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That is against the Privy Council ruling. There are cases in which such claims against the estate have been allowed, but they

in fact the whole case of the defendants rests. It is contended that the maintenance of Net Koowur was a charge on the whole, and every part of the estate of her husband Muddon Mohun; that the non-payment of the maintenance by Doorga Koowur, the tenant for the time, rendered the estate itself, and not her interest therein, liable to sale; that the suit and decree against her were not in her personal but in her representative capacity; and that under that decree, whatever were the intentions of the person executing it, what was sold, not having been expressly limited to the life-interest of Doorga Koowur, was the absolute estate, and that the purchaser is entitled to take everything that the decree can be made to cover.

It has been contended that the widow of Muddon Mohun was entitled to a share of his estate on partition; but as there was no partition, this is immaterial. As matters stood, she was entitled only to maintenance.

The point was considered in *Shao Dyal Tewaree v. Judoonath Tewaree* (a), and the observations of Mitter, J., thereon are conclusive. It is not denied that the person, whoever he or she may be, who holds it estate for the time being, holds the subject to a charge for maintenance; but, on the other hand, no authority is shown which goes the length of laying down that each and every part of the estate is so hypothecated for this charge that the holder, if, as was the case with Chintamun, he had an absolute interest uncontrolled by co-existing rights of sons could not alienate any portion, free from the charge,

however ample the remainder might be to provide for the widow's dues. I am not prepared to say that the widow could not under any circumstances have followed the property into the hands of the alienee, for it is unnecessary to discuss that question, but I have no doubt that if she wished to do so, she must do it by a suit expressly framed for the purpose. It is said that this was a suit against Doorga Koowur as representing the estate of Chintamun; but it seems to me that if she is to be treated as representative of Chintamun, and not as personally liable, it must be made out that there was a debt by Chintamun. But it is admitted that at his death Chintamun did not owe any portion of the money, for which Net Koowur obtained the decree under consideration. Apparently he did not owe Net Koowur anything for her maintenance at that time. The debt, it is said, was of the nature of instalments falling due on a bond executed by Chintamun; but the analogy is incomplete, for the claim did not arise out of any act of Chintamun, but altogether independently of him, and would have existed equally though he had attempted to ignore it; the agreement of 1234 (1826-27) between Net Koowur and her sons originated no right, it merely defined and limited one that already existed.

By the Hindu law, the claim was one to be satisfied by the holder of the property at the time when each successive annual payment became due. It is impossible to say that Chintamun, who died in 1252 (1844-45), was then in debt for allowances that actually did

are contrary to the Privy Council ruling. All a widow would have to do was to say she borrowed to pay the rent. The decree

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not become due for from ten to sixteen years later, and that possibly might never have become due at all. I must hold that the debt was debt incurred by Doorga Koowur herself (or more correctly by Doorga and Radhe Koowur, but the introduction of Radhe's name in no way affects the case).

This then being a debt incurred by Doorga Koowur, can she be said properly to represent all persons interested in the estate in the suit brought against her, or must the suit be held to have been against her personally. Assuming for the moment that Doorga Koowur's income, from the properties of which she was tenant for life with the rights of a Hindu widow, was ample to provide for Net Koowur's allowance, as well as her own necessary expenses, it could not be asserted that there was any legal necessity sufficient to render valid an alienation by her. A refusal to pay the allowance out of the income, and an alienation of the corpus to raise money for satisfaction of the claim, would be a wholly indefensible act, and an invasion of the rights of the reversionary heirs. Can it then be said that the person who had so invaded their right was a proper person to represent them in a suit brought to establish such a sale as valid against the estate? In the *Shivagunga* case (a), which has been quoted, their Lordships of the Judicial Committee no doubt do say, that "it is obvious that there would be the greatest possible inconvenience in holding the succeeding heirs were not bound by a decree fairly and properly obtained against

the widow," but this leaves it an open question in each case whether a decree binding the estate was fairly and properly obtained against her. The particular decree there referred to was one in a suit brought by the widow, which, if successful, would have resulted in benefit to the reversioners as well as to herself; but when the circumstances are reversed, when the conduct of the widow is prejudicial to the interests of the reversioners, I do not think we can say that a decree in a suit against the widow in temporary possession is necessarily a decree binding on all persons who take the estate in succession to her. I think it is clear that a suit against her to establish a sale made without legal necessity would not in any way bind the reversioners, and that she could not be said to represent them in such a suit. And I fail to see how she becomes their proper representative in a suit brought to recover a demand accruing entirely through her fault, especially as there was no prayer in the plaint that the estate or any particular portion of it should be declared liable to sale in satisfaction of the claim. It is said that the rights of Net Koowur are secured on the estate, and that her rights are not abridged, because Doorga Koowur held something less than the absolute interest. I am fully prepared to admit it. But the only result, as far as I can see, is that if Net Koowur desired to push her remedy beyond the life-interest of her debtor, she ought to have made the heir expectant a party. Had she done so, I think such heir would have been entitled to ask the Court to

(a) 9 Moore's l. A., 539, at p. 604.

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here was not such a decree as in *Ishan Chunder Mitter v. Buxsh Ali Soudagur (1)*, where the interest of the deceased proprietor

make the decree with a proviso that execution should issue against the defaulter in the first instance, and against him (the reversionary heir) only after the interest of the defaulter had been exhausted.

Numerous cases have been cited in which decrees against a widow have been held to be binding on the reversioners, and in which sales of the widow's interests have been held to convey the entire estate; but it is admitted that in all these cases the debt to be recovered was one existing before the widow entered into possession, and not one arising out of her neglect to do her duty.

In the case of *Nugenderchunder Ghose v. Sreenuttu Kaminee Dosses (a)*, cited by Mr. Woodroffe who appeared for the appellants, it was held that when an action was brought against a person in possession of an estate with a limited interest, in the form of a personal action, and the decree gave no remedy against the estate, it could only be enforced against the property of the person in possession including her limited interest in the estate. In that suit, the personal nature of the action was, no doubt, fixed by the form of the suit as under s. 9, Act I of 1845: in the suit of *Net Koowur* we have not a specific enactment which distinctly determines the nature of the action; but in the absence of any specific prayer in the plaint to make the estate liable, and the corresponding absence of any specific declaration in the decree of the liability of the estate, and looking to the origin of the debt, and the omission to make the reversioners

parties, I would hold that there is no evidence to show that the suit was anything more than a personal action.

The respondents rely on a passage at the conclusion of their Lordships' judgment in the following terms:—"Their Lordships wish it to be understood that they leave unimpaired the general rule that in a suit brought by a third person, the object of which is to recover or to charge an estate of which a Hindu widow is the proprietress, she will, as defendant, represent and protect the estate as well in respect of her own as of the reversionary interest;" but for their purpose they must expunge the words "and protect." Their Lordships say not merely "represent," but "represent and protect," and I think we are bound to hold that where protection is evidently absent, representation of the reversionary interest is also wanting, and moreover their Lordships refer to suits of which the object is (either expressly or by necessary implication from the facts) to recover or charge the estate.

I have assumed that *Doorga Koowur* was in a position to meet the demands upon her: looking to the form of *Net Koowur's* suit, it seems hardly necessary to go further and enquire whether this was so in fact, but, as there is evidence on the point before us, it may be as well to refer to it briefly.

In the outset, I think, we may fairly presume that the allowance for maintenance was a reasonable charge, which the estate could bear,

(1) *Marsh*, 614.

(a) 11 *Moore's L. A.*, 241.

being sold, the estate passed. That decision was approved of by the Privy Council in *The General Manager of the Raj Durbhunga v. Maharaja Coomar Ramaput Singh* (1). In those cases the debt was due by the husband. The decree here is, in principle, similar to that in *Brijbhokun Lal Awstee v. Mahadeo Doobey* (2), where there was a claim to be satisfied annually, and it was assumed that there were ample profits, and it is submitted that the same assumption should be made here. The first Court did not decide whether there was any necessity: the lower Appellate Court professes to decide that question by merely saying that Mitter, J., held in *Teluck Chunder Chuckerbutty v. Muddon Mohun Brahmin Joogee* (3) that a decree for rent is a debt against the estate; therefore he assumes there was necessity.

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Baboo Doorga Mohun Doss for the respondents.—The only ground on which the plaintiff claimed the property was that

without unduly entailing the profits derivable by the two sons of Muddon Mohun, which subsequently accumulated in the hands of Chintamun. With the exception of the sale of manzās Birnee, Sower, and some house property in Chintamun's lifetime, it does not appear that the estate of Muddon Mohun had been materially reduced at the time when it came into the hands of his son's widows, nor is it shown that there were incumbrances created by Chintamun, which the widows were obliged to clear off. The plaintiff has given evidence to show that the property which is the subject of this litigation was of considerable value and yielded a sufficient income to meet all reasonable expenditure, and the transactions of, or in the name of, Bechun Doobey since the auction-sale also indicate that the property was a valuable one: then there were other properties which the widows held, but which have since passed away from them by sales in execution of earlier decrees for Net Koowur's maintenance:

There is nothing to show how the incumbrances grew up, which ended in the widows having no sufficient income to meet Net Koowur's claim, or that they were of such a nature as to constitute proper charges on the estate.

Holding that nothing passed by the execution-sale of 19th June 1866 but the personal interest of Doorga Koowur, I need not go on to determine the further questions raised by the defence.

I would allow the appeal, and reverse the decision of the Court below, and make a decree in favor of the plaintiff for possession of the properties set out in the plaint, with costs in both Courts and interest on the same from the dates of the decrees in this Court and the Courts below respectively at 6 per cent. per annum.

(1) 10 B. L. R. 294; S. C., 14 Moore's I. A., 605.

(2) *Ante*, p. 145.

(3) *Ante*, p. 143.

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the rights and interests of the widow only had been sold under the decrees: and not on the ground that the rent accrued in the widow's lifetime. The plaintiff ought to have asserted that and proved it. The onus was upon him to make his case complete. But supposing the rent did accrue in the widow's lifetime, it is a debt against the estate as held by Mitter, J., in *Teluck Okunder Chuckerbutty v. Muddon Mohan Brahmin Joogee* (1). The question of necessity has not been tried at all. The case ought to be remanded in order that it should be tried now—*Bistobehari Sahoy v. Lala Bijanath Prasad* (2).

Mr. Evans in reply.

The Judgment of the Court was delivered by

COUCH, C.J. (who, after shortly stating the facts, continued):—
 The case first came to be heard before us on the 16th of September last, when it was admitted that the decrees were not decrees under Act X of 1859, and it was stated that the rent which was the subject-matter of one suit, and for which the bond which was sued upon in the second suit was given, was rent which became due after the death of Chundi Proshad.

It was contended before us by the pleader for the respondent that this had not been found by the lower Courts, and we were asked to have the question now raised; but we are of opinion that the rent must be considered to have become due after Chundi Proshad's death.

The first Court, the Additional Subordinate Judge, after stating in the judgment what the suit was for, stated the points which arose in the suit for determination. One of them was, "when did Kantishuree die, and whether she was in possession within twelve years next before the date of the suit," and the next was, "whether the talooks were sold in public sale for legal purposes, or for the recovery of the personal debts of Kantishuree." The whole of the Judgment shows that the case was treated as if the rent had become due in her time, and

(1) *Ante*, p. 143.

(2) 7 B. L. R., 213.

not in the time of her husband. It is true that the defendants, in their written statement, say that the rent did become due in the lifetime of Chundi Proshad, but they do not appear, on the hearing either before the first Court or the Appellate Court, to have asked to have that question tried. On the contrary, the whole case has been allowed by the defendants to be tried in both the Courts, as if the rent had become due after the death of the husband. And they cannot now, simply because they made that allegation in their written statement, be allowed to raise the question. Where parties allow a suit to be conducted in the lower Courts as if a certain fact was admitted, they cannot, afterwards in a special appeal, question it, and recede from the tacit admission. I acted upon this principle in the case of *Devaji Goyaji v. Godadbhai Godebhai* (1), which was appealed to the Judicial Committee of the Privy Council, and the judgment was confirmed. There being an objection that there was no evidence to connect the plaintiffs with the parties to a certain deed, I said.—“This objection was not taken in the grounds of appeal to the Judge, and appears not to have been taken before the Munsif. The suit appears to have been conducted as if this was admitted, and when that is the case, we think an objection of want of evidence of the fact cannot be taken on a special appeal. *Stracy v. Blake* (2) and *Doe d. Child v. Roe* (3) are instances of the application of this principle.”

I proceed therefore to consider the case, assuming it to be the fact that the rent became due after the death of Chundi Proshad.

That distinguishes the present from the case of *Ishan Ohunder Mitter v. Buksh Ali Soudagur* (4), and the decision of the Judicial Committee in *The General Manager of the Raj. Durbhunga v. Maharaja Coomar Ramaput Singh* (5). There in a suit by A against B for arrears of rent, a decree was obtained by A against B's widow, B having died pending the suit. Under this decree execution was obtained, and the

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(1) 2 Bom. H. C. Rep., 28.

(2) 1 M. & W., 168.

(3) 1 E. & B., 279.

(4) Marsh., 614.

(5) 10 B. L. R., 294; S. C., 14.
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interest of the widow was sold under Act XI of 1859. The amended certificate stated that the estate was sold by virtue of the decree; and it was held, reversing the decree of the High Court, that the sale was not of the widow's personal interest, but as representative of her husband's estate. What is laid down there, and also in the case of *Ishan Chunder Mitter v. Buksh Ali Soudagur* (1), is, that where the suit is brought in respect of a debt due from the husband, the decree against the widow, although it may be apparently a decree against her personally is not to be considered as such, but as a decree against her as the representative of her husband's estate, and the decree may be executed as such.

In the present case, the debt was not due from the husband and, if the estate of the husband is to be charged either for the arrears of rent becoming due after his death, or for the bond which was given by his widow, it can only be upon the ground that the debts were necessarily contracted by the widow, or under such circumstances as to make the whole estate liable, and not merely the interest in it of the person who contracted them.

The suits were against the widow, and the decree made in both were against her, and purported to be against her personally. The question whether the debts were necessarily incurred, so as to charge the estate, was not tried in either of the suits. It was not necessary for the plaintiff in either of them to prove that in order to obtain a decree, he had a right to a decree against the widow upon proving, in the one case that the arrears of rent were due, and in the other that the bond was executed by her. The question, upon which the liability of the estate depends, could not be tried in executing these decrees; for s. 11 of Act XXIII of 1861 only authorizes the Court to try questions arising in execution of the decree between the parties to the suit. But the question here is not between the plaintiffs in those suits and the widow; it is between the purchaser at the sale in execution, and the reversioner, the person entitled to the estate after the death of the widow. He was not a party to either of the suits in which the decrees were made.

Nor has the question been tried in the present suit. The

(1) Marsh., 614.

Subordinate Judge, as I have already read, states as an issue of fact, "whether the talooks were sold in public sale for legal purposes, or for the recovery of the personal debts of Kantishuree;" but in his judgment he says:—"In the present case the *bona fide* of the decree and of the sale not having been impeached, it would cast an insurmountable difficulty upon the defendant to substantiate the prior legal necessity on the part of the widow which has caused the sale of the property. On the other hand, an attempt has been made by the plaintiff to show that the widow had ample means for meeting the demand of the zemindar, but certain tutored witnesses merely stating that she had an income of Rs. 500, or 600, is too vague an evidence to warrant a call upon the opposite party to rebut the evidence by any negative proof." That is, instead of requiring the party whose title depended upon there being a necessity for the widow to contract debts to prove it, he merely says there would be an insurmountable difficulty to his doing so, and throws upon the other party, the reversioner, the burden of proving the contrary. This is what has occurred: there having been some time since a personal decree against the widow, the whole of the property was taken in execution and sold, and the person purchasing it is held entitled to keep it without proving the fact upon which his title depends, because, as the Subordinate Judge thinks, there would be an insurmountable difficulty in the way of his substantiating it. The question, which ought to have been tried, is thus left untried, and a decree has been made in favor of the defendants without any evidence on their part.

Then upon the appeal, the District Judge, instead of trying the question upon evidence, says:—"The first question which the lower Court should have decided on the merits was, whether there was legal necessity on the part of the widow to incur the debts under which the sales were made;" and as to the legal necessity, he says:—"It was ruled in *Bistobehari Sahoy v. Lalal Biagnath Prasad* (1) that in a suit by a reversioner to set aside a sale in execution of a decree against a Hindu widow, plaintiff's cause of action depends on whether there was legal necessity for the widow's incurring the debt which burdened her

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1875 husband's estate; if there was, the entire estate would pass; if not, her life-interest only; and the question is, "is the payment of rent to the zemindar by a Hindu widow a legal necessity." And upon the authority of *Teluck Chunder Chucker-buttty v. Muddon Mohun Brahmin Joogee* (1), the Judge held that the mere fact of the claim against the widow being for arrears of rent made it a case of necessity, and without taking any evidence on the subject, decided the question against the plaintiff.

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In that case, Mitter, J., does say that "the rent due to the zemindar cannot under any circumstances be treated as a personal debt of the widow; and if the zemindar thought it proper to put up the properties now in dispute for sale for the realization of that rent, after having obtained a decree for it in due course of law, the reversionary heir can have no right to come in after the death of the widow and take back those properties from the hands of the purchaser. If the widow have contracted a debt to meet the zemindar's demand for rent, and then alienated a part of her husband's estate for the satisfaction of that debt, the alienation would have been good and valid in law; and we do not see reason why less effect is to be given to a decree passed by a Court of competent jurisdiction, in execution of which decree certain properties belonging to the estate of the widow's husband were brought to sale and purchased by the special appellant's vendor."

We have only such information of the facts of this case as can be obtained from the judgment of the learned Judge. It does not appear whether the rent which was the subject of the suit became due after the death of the husband. Possibly it did. If it did not, the case would be like *Ishan Chunder Mitter v. Buksh Ali Soudagur* (2) and *The General Manager of the Raj Durbhunga v. Maharaja Coomar Ramaput Singh* (3). But the learned Judge when he speaks of what the zemindar might have done, probably thought that this course had been taken, and that the zemindar having obtained a decree in due course of law, it authorized the sale of the whole of the estate. If the judgment

(1) *Ante*, p. 143. (2) *Marsh.*, 614.
(3) 10 B. L. R., 294; S. C., 14 Moore's L. A., 605.

goes to the extent of holding that a decree for rent due from a widow, and against her personally, can, from the mere fact of its being a decree for rent and without any evidence, be considered as a decree for a necessary debt (the suit in which it is obtained being one to which the reversioner is not a party, and therefore has never had an opportunity of contesting whether the debt was a necessary one), it is opposed to the judgment of the Judicial Committee of the Privy Council in *Neugenderchunder Ghose v. Sreemutty Kaminee Dasse* (1). There, a decree having been obtained against a widow in respect of a charge which she had made, it was held that it could only be enforced against such interest in her deceased husband's estate as she possessed. And their Lordships pointed out that, if the person obtaining the decree had a right to such a decree as would affect the estate of the husband, and be anything more than a decree against the widow personally, the suit ought to have been one to enforce the mortgage and to make it a charge upon the estate. Their Lordships say that it was impossible for them to upset the decision of the High Court, which in substance only affirmed that an action brought under s. 9 of Act I of 1845 is only a personal action, and that is an action which was personal against Kaminee Dossee as the possessor of the talook, only her property and her interest in the talook can be affected, and that an equity which the plaintiff possessed, and which she might have enforced against the owners in reversion also, cannot be enforced against them in a suit brought to extend and enforce a personal decree against the possessor of the limited interest. They then say that they "wish it to be understood that they leave unimpaired the general rule that in a suit brought by a third person, the object of which is to recover, or to charge an estate of which a Hindu widow is the proprietress, she will, as defendant, represent and protect the estate, as well in respect of her own as of the reversionary interest."

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This passage was relied upon before us, but it is not applicable to a suit like the present. Here, the suits upon which the decrees were obtained against the widow were not suits in which

(1) 11 Moore's I. A., 241.

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the widow could be said to represent or protect the estate in respect of the reversionary interest.

Their Lordships were speaking of suits where the widow might be suing to recover property which she said was part of the estate, or where the widow might be sued for the recovery of property in her possession as part of the estate, and which she would bring or defend as representing the estate, and not only in respect of her own interest. Here the suits were against the widow only, she cannot be said to have been defending them as representing the reversioner, or as protecting his interest. She was defending on her own account; and the suits were not framed in such a way as to seek to have the whole of the estate charged. The reversioner, the person who was interested in preventing that, was not a party to the suits, and had no opportunity of being heard.

The result of the authorities appears to be that where the debt has not accrued in the lifetime of the husband and is not his debt so that the widow is sued as his representative, the decree against her in a suit to which the reversioner is not a party, can only be considered as a personal decree against her, and be enforced by the sale of her interest only, except where the proceeding is one which authorizes the sale of the tenure under Beng. Act VIII of 1869. Here the plaintiff, who sued for arrears of rent, did not take the course which he might have adopted, and ask to have the tenure sold for the arrears due in respect of it. He sought and obtained something different from that, and under his decree he sold other tenures. It is found that what was sold was not merely the tenure in respect of which the rent accrued, but others. In fact, having obtained a personal decree against the widow, he executed it against any property of hers which he thought fit. I think that the Courts were wrong in treating this as a sale in execution of a decree for a necessary debt, and in holding that the plaintiff is not entitled to recover. The second suit was upon a bond for arrears of rent of which a very small part was due in respect of the property which was sold in execution, and in neither case was there any proceeding under Beng. Act VIII of 1869.

Then the question is, what is the effect of this upon the plain-

tiff's right to recover. It does not appear to be disputed that the plaintiff is the reversioner. The issue was raised in the first Court whether there was a legal necessity. The defendants had an opportunity of offering any evidence upon that which they thought fit to give. It appears from the judgment that they did attempt to prove it. The plaintiff gave some evidence to disprove it, but the burden was not upon him to do this. The issue having been raised in the first Court, and the defendants having had an opportunity of giving evidence upon it, and not having done so, it would not be right for us now to remand the case in order to have that question tried. Indeed it would appear from the judgment that it would be of no service to the defendants to remand it for that purpose. But whether it would, or not, it is not right that fresh evidence should be now produced, the defendants not having thought fit to give the evidence when the issue was to be tried by the first Court. The consequence is, that the plaintiff has shown that he is entitled to the property the widow being dead, and the defendants whose title depends upon the sales in execution have failed to show that they acquired by the sales more than the right which the widow had, and which has now been determined. The result is, that the plaintiff's claim has not been met by any proof on the part of the defendants, and that he ought to have a decree for the recovery of the property, with costs in all the Courts.

Appeal allowed.

ORIGINAL CIVIL.

Before Mr. Justice Pontifex.

NILMADHUB MOOKERJEE v. DOOKEERAM KHOTTAH

AND OTHERS.

Action for slander—Misjoinder—Special Damage.

An action for slander cannot be brought jointly against several defendants separate actions should be brought against each.

Quere.—Whether words implying "you are a drunkard, thief, cheat, and the paramour of your sister-in-law, you bastard," applied to a Brahmin, are actionable *per se*, without allegation of special damage.

Suit to recover the sum of Rs.2,000 as damages for slander. The plaintiff stated that the plaintiff was a Hindu belonging

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to a high Brahmin caste, and, according to the usages, manners and customs of the Hindus of Bengal, enjoyed amongst his Hindu countrymen a high special position; that in the year 1874 the plaintiff was by reason of his good birth, liberal education, and unexceptional moral character appointed to be the assistant head master of an English school at Burranagore in the suburbs of Calcutta called the "Burranagore School," and, at the time of the committing of the grievances hereinafter mentioned, he was and still now is the assistant head master of the said Burranagore school, and still held that position; that on the 12th of July 1874 the defendants falsely and maliciously spoke and published of the plaintiff in maniktullah street in Calcutta the following words in the Bengali language, that is to say, *হুই খাতলি, ধোর, জোরাফোর, জোর মানি নিষ্কারিণীয়া নাং হুই, কুই বেজমা* which said words being translated into the English language have, and were understood by the persons to whom they were so published to have, the meaning and effect following that is to say, "you are a drunkard, thief, cheat, you are the parmaour of your sister-in-law, Nistarinee, you bastard;" that according to the usages, manners, and customs of the Hindus of Bengal, no person who is not of legitimate birth can be a Brahmin, and it is an inexpressible offence for a Brahmin to drink any intoxicating liquor, and any Brahmin guilty of the offence is liable to be excluded from caste and to lose all the privileges and immunities enjoyed by the Brahmins; that the defendants' object in speaking and publishing the words aforesaid was to show that the plaintiff was an imposter in so far as the plaintiff was known and respected as a Brahmin, to procure the plaintiff's exclusion from his caste as being a drunken person, to lower the plaintiff in the estimation of his countrymen, and to injure the plaintiff in his profession as such assistant head master as aforesaid with his employers; and that by reason of the defendants' conduct the plaintiff has sustained damages to the extent of Rs. 2,000 which he sought to recover in the present suit.

Three persons were joined as defendants in the suit.

An application was made to take the plaint off the file on the ground that the defendants had been wrongly joined in the suit.

Mr. Kennedy in support of the application.—The defendants ought to have been sued separately; a joint action cannot be maintained against several persons for verbal abuse: see Chitty on Pleading, 7th Edition, p. 97, and *Chamberlain v. White* (1) and other cases there cited. See also as to separate indictments for exercising a trade, *Rez v. Weston* (2), and for perjury, *Rez v. Phillips* (3). It is not necessary to join all the defendants in actions of tort; but recovery of damages against one bars an action against the others. There is not enough alleged in the plaint to support an action for slander. There is no indictable offence imputed to the plaintiff by the words used—*Feiss v. Linder* (4). The mere calling a person a thief is not sufficient—*Penfold v. Westcote* (5). These are words of mere vulgar abuse, and no persons except the plaintiff and defendants were present. The words must, to make them slanderous, be spoken of a person so as to tend to injure him in his profession.

Mr. Bonnerjee, *contra*.—This is a case between Hindus, and the English law would be inapplicable. That law has been held in several cases not to apply to Hindus—*Attorney-General v. Burnomoyee Dossee* (6). It is in the discretion of the Court what law to apply in such a case as this; therefore it is not to be assumed that English law applies. It is submitted the law to guide the Courts in this case is that laid down in cases decided on appeal from the mofussil. From the principle laid down in *Chamberlain v. White* (1), it might be inferred that in cases of assault and battery where the action of one defendant is not the action of the others, a joint action would not lie, but such an action will lie; see Chitty on Pleading, p. 96; *Mortow v. Belcher* (7). As to joint indictments, see *Rez v. Benfield* (8), in which two persons were jointly indicted for uttering a libellous song, and *Reg v. Gerrish* (9). [Mr. Kennedy.—*Morrow v. Belcher* (7) was a case of trespass, this is not trespass.] Trespass is not used in the technical sense, but means wrong or injury. In a case of

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(1) Cr. Jac., 647.

(2) 1 Strange, 623.

(3) 2 Strange, 921.

(4) 3 B. & P., 372.

(5) 2 B. & P., N. R., 335.

(6) 9 Moore's I. A., 523.

(7) 4 B. & C., 704.

(8) 2 Burr., 980, at p. 985.

(9) 2 Moo. & Rob., 219.

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tort, the person injured may at his election sue all or any number of the wrong-doers—*Cabell v. Vaughan* (1). If an action will be jointly in a case of assault, why should not the form of action be the same in a case of verbal abuse? The former causes physical pain, the latter mental pain. Here such a combination of intention is shown as to make all the defendants responsible for the acts of one another. The plaintiff was justified in bringing the suit in its present form. The proper course would be at the hearing to dismiss the suit against any defendant unnecessarily joined. Whatever may be the English law in the matter of pleadings, this Court is governed by Act VIII of 1859. There have been cases in which such an action has been allowed to be joint—*Kali Kumar Mitter v. Ramgati Buttacharji* (2) [Mr. Kennedy.—There appears to have been only one respondent there] and *Altuf Hossein v. Tasuddook Hossein* (3). In England such a case has been allowed; the objection however was not taken—*Maitland v. Goldney* (4) [Mr. Kennedy.—That was an action for libel in an affidavit.] It is cited in Addison on Tort, p. 811, and Starkie on slander, p. 334, as an authority that two can be sued together in such a case.

As to the words being actionable, it is said they must be actionable *per se*, as no special damage is alleged. But an action will lie for mere verbal abuse—*Moulvee Gholam Hossein v. Hur Gobind Dass Tushildar* (5) and *Shaikh Tukee v. Shaikh Khoshdel Biswas* (6). [Mr. Kennedy.—That is only in the mofussil. *Kashiram v. Bhadu Bapuji* (7) shows the distinction between a suit brought in the mofussil and one in the High Court.] It would be monstrous, if one law is to apply to Hindus in the mofussil and another in Calcutta. It is not necessary for the plaintiff to show special damage, the words are actionable *per se*. Calling a man a thief is actionable as imputing an offence punishable by law—*Tomlinson v. Brittlebank* (8); if not it is for the defendant to show the word was not intended to bear its usual

(1) 1 Wm. Saunders, 291f; Coke on Littleton, 232a.

(2) 6 B. L. R., App., 99.

(3) 2 Arg. H. C. Rep., 87.

(4) 2 East, 426.

(5) 1 W. R., 19.

(6) 6 W. R., 151.

(7) 7 Bom. H. C. Rep., A. C., 17

(8) 4 B. & A., 630.

signification, but was merely a general term of abuse, and this should be shown not in demurrer, but at the hearing of the case; see also *Fewler v. Dowdney* (1). In *Starkie on Slander* it is said (p. 29) an action for slander may be maintained without proof of special damage, 1.—If an indictable offence be imputed; 2.—If a contagious or infectious disorder be imputed; 3.—If any injurious imputation be made affecting the plaintiff in his office, profession, or business; 4.—If the words tend to the dishonour of the plaintiff. The present case would come under the first, third, and fourth heads. It is submitted that the same rule should apply to a Brahmin as to a beneficed clergyman, as to alleging anything against his moral character. The Brahmin has sacred duties, and his great authority to confer obligations by the performance of them lies in his reputation for sanctity. [PONTIFEX, J.—The plaintiff does not say the defendants knew he was a Brahmin.] They would have known it by his name. As to the dignities of a Brahmin, see Menu, Ch. i, p. 12, v. 87, and following verses. It is submitted that calling a Brahmin a drunkard and a bastard are words actionable *per se*. The artificial distinction between oral and written defamation which has obtained in England, should not be applied here. The cases are inconsistent and irreconcilable.

Mr. Kennedy in reply.—To apply English law is not introducing a new law. By George III, c. 70, s. 21, there are certain cases in which Hindu law is to be applied: this case is not one, therefore the ordinary law must be applied. The law of escheat which it was held in *Attorney-General v. Surnomoyee Dossee* (2) did not apply to India is a very special law. It is not a proper analogy to put a mere Brahmin on the footing of a beneficed clergyman; if he were a *purohit* or a *guru*, i. e., a Brahmin in the actual exercise of the most sacred of his duties, the analogy would be more apparent.

The principle as stated in *Starkie on Slander*, p. 338, is the same as that laid down in 47 Edward III, fol. 16, c. 23. In *Maitland v. Goldney* (3), the point of the form of action did not arise. In *Kali Kumar Mitter v. Ramgati Bhuttacharji* (4),

(1) 2 Moo. & Rob., 119.

(2) 9 Moore's I A., 523.

(3) 2 East., 426.

(4) 6 B. L. R., App., 99

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there only appears to have been one respondent, and the point was not decided.

Cur. adv. vult.

PONTIFFEX, J.—I have looked at the English authorities cited by Mr. Kennedy, and have no doubt that the rule is that when a defendant is sued in England for verbal slander, he must be sued alone. If that had been a rule of procedure only, I should not have been bound to follow it here. But I think it is not only a rule of procedure but one of convenience founded on reason. Each person sued for verbal slander is responsible only for what he himself has uttered, and the plaintiff is not entitled to bring him before the Court while he is proving his case against another defendant for what the first defendant is not himself responsible. In libel, each person is liable for the entire publication, and therefore they may be properly sued together. As to whether the words complained of here are libellous *per se*, I must say I have doubts upon the matter, and I must give the plaintiff the benefit of those doubts. I therefore give the plaintiff leave to elect which of the defendants he will proceed against in this suit, and give him liberty to bring fresh suits against the other defendants whom he dismisses from this suit. Actions for verbal slander ought not in my opinion to be encouraged. Unless there are special damages proved, the Court will be very reluctant to give any damages. It is not necessary that the Court should give even nominal damages. It is for the plaintiff to consider whether he thinks it worth while to go on against any one of the defendants.

The Court on the application of Mr. Bonnerjee then granted permission to proceed against the third defendant. The plaintiff to pay the costs of this application (1).

Attorney for the plaintiff: Baboo T. B. Chatterjee.

Attorney for the defendants: Mr. Remfry.

(1) Before Mr. Justice Phear.

The 15th March 1875.

WOOZEERUNNISSA RIBEE v. SYED
MAHOMED HOSSEIN AND OTHERS.

Action for Slander—Misjoinder—
Special Damages.

An action for slander may be brought jointly against several defendants where the words spoken are not actionable *per se*, but only become so by reason of the special damage, which is the result of the conjoint action of all the defendants.

This was an action against seven defendants for slander.

APPELLATE CIVIL.

Before Mr. Justice Glover and Mr. Justice Mitter.

DELROOS BANOO BEGUM (DEFENDANTS) v. NAWAB SYUD ASHGUR
ALLYKHAN AND OTHERS (PLAINTIFFS).*

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Wakf—Mahomedan Law—Shiah Sect—Public and Private Endowments—Act XX of 1863, ss. 4, 7, & 18—Regulation XIX of 1810—Jurisdiction of Civil Court—Court Fees Act (VII of 1870), Sch. ii, Art. 17, cl. 3—Stamp—Suit to remove Mutawalli—Consequential Relief—Pardanashin—Onus Probandi.

A, a Mahomedan lady, executed a wakfnama purporting to dedicate the whole of her property to an imambara in her house, for the purpose of perpetuating various Shiah ceremonies. By the wakfnama she constituted herself joint-mutawalli with one B, and caused the names of herself and B as

The plaintiff stated in her plaint that she was a Mahomedan lady of position and property, residing, according to the custom of this country, in strict seclusion; that wishing to register a power of attorney, she sent for the District Registrar of Assurances, but that upon his arrival the first defendant (who was a co-sharer with her, and who, with the other defendants, resided in the same house, though in separate apartments from the plaintiff) "contriving and intending to injure and defame the plaintiff, and to hinder and prevent the plaintiff from procuring the registration of the said power of attorney by the said Registrar, falsely and maliciously spoke and published to the said Registrar of and concerning the plaintiff the false, malicious, and defamatory words following:—*মহাবর! উজ্জ্বলেনা দিবি পায়ল। পায়লেন বিষম কিকণে শ্রেষ্ঠিগি হয়। মর্যাদা, রাসদারদাভারদেবে এবে পাগল বলেছে*, that is to say, Woorunissa Bibee is insane. How can the

insane's affair be registered? Sir, Ram Narain Doctor having seen told her insane;" and that the remaining defendants, "who are all the dependants and friends of the said Mahomed Hossein, afterwards and before the execution and registration of the said power of attorney, in pursuance of the injurious and malicious design of the said Syed Mahomed Hossein aforesaid, at his request and in order to give color and support to his aforesaid false, malicious, and defamatory words, addressing themselves to each other and the said Registrar, falsely and maliciously spoke and published to the said Registrar, of and concerning the plaintiff the words following" (here followed the words made use of above); that by reason of the said false, malicious, and defamatory words so spoken and published by the defendants of and concerning the plaintiff, the Registrar was misled and deceived respecting her sanity, and under the provisions of the

* Regular Appeal, No. 63 of 1874, against a decree of the Judge of Zilla 24 Pergunnas, dated the 21st March 1874.

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mutawallis to be substituted in the Collector's register for her own name as owner. On the death of B, A acted as the sole mutawalli. The wakfnama was publicly registered. But though the property was styled wakf, and A the mutawalli thereof, in all documents connected with the estate, A all along continued to deal with its absolute proprietress, and the dedication, though made in 1852, was never under the control of the Board of revenue or of local agents. In a suit which the plaintiffs obtained leave to institute under s. 18 of Act XX of 1863 to remove A from the the mutawaliship on the ground of misfeasance, held the wakfnama did not constitute a public religious establishment within the meaning of Act XX of 1863, and that therefore the Judge below had no authority to give the plaintiffs under s. 18 leave to sue, and that his decision was consequently *ultra vires*. S. 18 of Act XX of 1863 applies only to such religious establishments as were under the control or superintendence of the Board of Revenue or of local agents under Regulation XIX of 1810, and were transferred to trustees or managers under s. 4 of the Act. Held also that where the defendant who was shewn to be an illiterate pardanashin lady, denied on her oath that in executing the wakfnama she had any intention of

Registration Act, 1871, refused to register the power of attorney until the plaintiff should satisfy him by competent medical authority that she was a person of sound mind and intellect, and that by reason of the premises, she was compelled to engage the services of Dr. Woodford, and to submit to being examined by him touching her sanity, and to appear unveiled before him, and to converse with him unveiled, contrary to the manners and customs of respectable Mahomedan ladies of this country, whereby she was annoyed and distressed and compelled to undergo great inconvenience and indignity, and was further put to expense in paying Dr. Woodford's fees and other charges. Finally, she alleged that Dr. Woodford having certified to the Registrar that she was perfectly sane, the latter registered the power of attorney. She prayed that the defendants might be decreed to pay her Rs. 25,000 as damages for the wrongs alleged.

The defendants, in their written

statements, raised various defences, some denying that they had spoken the words imputed to them, others pleading simply not guilty, and some alleging that the words spoken by them were true.

The case came on for settlement of issues.

Mr. Woodroffe for the plaintiff.

Mr. Lowe for some of the defendants:

Mr. Branson for the others.

Mr. Branson took the preliminary objection that the suit could not be maintained in its present form, but that the defendants ought to have been sued severally—*Chamberlain v. White (supra)*.

PHILLIPS, J., overruled the objection, pointing out that in the present case the words spoken were not actionable *per se*, but became so by reason only of the special damage, which was the result of the conjoint action of the several defendants.

creating an absolute wakf, or that she understood the effect of the deed when she executed it, the onus was on the plaintiffs to show that she was fully aware of the character of the document and its legal effect, and that she had proper professional advice at the time of its execution. In the absence of such proof, *held* that the deed was not binding on her.

Where the plaintiffs sued for a declaration that a mutawalli had been guilty of misfeasance, and asked to have her removed from the mutawalliship and themselves appointed in her place, whereby they would have been entitled to a share in the profits of the wakf, *held*, that the fixed stamp fee of Rs. 10 required by cl. 3, Art. 17, Sch. II of Act VII of 1870, was not sufficient; but the plaint should bear a stamp of a value proportionate to the subject-matter of the suit.

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THIS was a suit by the plaintiffs, as members of the Mahomedan community, against the defendant, as the mutawalli of a certain endowment, for her removal from the office on the ground of misfeasance with the wakf estate.

The plaintiffs alleged that on the 25th of Zikad 1268 A.H. (corresponding with the 10th of September 1852), the defendant Delroos Banoo Begum executed a deed of endowment or wakf-nama, whereby she dedicated absolutely the whole of her property to a certain imambara; that she constituted herself and a certain Jigri Khanum joint-mutawallis of the wakf estate; that Jigri Khanum dying shortly afterwards, the defendant had ever since acted as sole mutawalli; that for some time past the defendant had been misdealing with and misappropriating the trust property, and that she had lately made over a portion of the estate to the use of a Hindu deity. And the plaintiffs prayed for the removal of the defendant from the office and for the appointment of a qualified person thereto, pointing out that the plaintiffs Ashgur Ally and Ahmed Ali were heirs to the defendant, and were competent and anxious to protect the wakf estate. The plaint was engrossed on a stamp of Rs. 10 on the ground that the relief sought for was with reference to the office of a mutawalli, and could not be estimated in money-value.

The plaintiffs, on the 29th of November 1873, obtained leave from the Judge of the 24-Pergunnas to institute the present suit under s. 18 of Act XX of 1863, and the plaint was filed on the 17th of January 1874. By the deed in ques-

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tion, the defendant declared that she endowed the whole of her property in perpetuity, and provided that the income derived from the endowment, after the payment of the Government revenue, should be divided into twenty-eight parts, fifteen parts whereof should be applied to the expenses of the *fatiha* of Mahomed and the Imams, as well as to those of the first ten days of the Mohurram and all the holidays, and the repairs of the imambara and the tombs; seven parts should be received by the amlahs and servants, whose names should be inserted at the foot of the document in question or any other document bearing the defendant's seal and signature, and which the said servants might have in their possession, some from generation to generation, and others as long as they retained service; and the remaining six parts should be received by the mutawallis, i.e., the defendant and her co-mutawalli. The defendant's answer was as follows:—that as the plaintiffs prayed for substantive consequential relief, the plaint was inadmissible on a stamp of Rs. 10; that the Judge had no power to grant leave to the plaintiffs to sue under s. 18 of Act XX of 1863, inasmuch as the alleged endowment did not come within the scope of Act XX of 1863; that the plaintiffs had no right to attend at, or to share in, the benefits of the shrine, and were therefore not entitled to sue under the Act; that the alleged endowment, if an endowment at all, was created simply for the private use and benefit of the defendant, and accordingly the plaintiffs and the outside public had no right to claim any benefit therefrom; that the document which the plaintiffs called a wakfnama was not executed with the intention of creating an absolute wakf, and that the defendant did not intend to give effect to it during her lifetime, and that she only purported it to have operation after her death for the purpose of perpetuating certain family religious usages and ceremonies, and that therefore she was entitled to deal with the property as absolute owner thereof, and could not be charged with misfeasance therefor; that the defendant was not aware of the contents and legal effect of the deed in question at the time of its execution; that the wakfnama was void and inoperative, inasmuch as it provided for the application of a portion of the income of the estate

covered by it to purposes other than religious ones ; and that as the defendant had adopted the Sunni form of religion on her marriage with a Sunni, the wakf was bad, being made for impious purposes under the Sunnite branch of the Mahomedan law.

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The plaintiffs proved that the defendant in the year 1852 executed and registered the deed, and in pursuance thereof caused a transmutation of names in the Collector's register in favor of herself and her sister-in-law Jigri Khanum as mutawallis in place of herself as proprietor ; that since then she had described the estate as a wakf mehal, and herself as the mutawalli in all the receipts and dakhilas issued out of her zemindari catcherry, and that she had continuously observed the ceremonies and usages provided for in the wakfnama from the time of the endowment up to the institution of the suit. In order to make out the charge of misfeasance, the plaintiffs proved that the defendant had granted mukarrari leases of the wakf estate ; that she had also granted a small portion of it in perpetuity to her Hindu dewan for the purposes of a Hindu temple, and that she had made various reductions in the expenditure for the ceremonies of the Mohurram, &c.

On the part of the defendant it was proved that the imambara was within the female apartments of her dwelling-house and that she had the power of prohibiting strangers from entering it ; that she was a pardanashin, and perfectly illiterate ; that she executed the wakfnama without any professional advice ; and that its purport and legal effect were never explained to her.

The Judge gave a decree in favor of the plaintiffs holding that the deed of endowment created a valid and irrevocable wakf under the Mahomedan law ; that the defendant had failed to prove that in executing the tauliatnama she had been in any way deceived, or was ignorant of the effect of her acts ; that it was a public endowment ; and that the plaintiffs representing the Mahomedan community had a right to maintain this suit. The Judge also found that the defendant had misconducted herself in her office of mutwalli, and he directed that she should be removed from the mutawalliship, and the plaintiffs Ashgur Ally and Ahmed Ally be appointed in her place.

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The defendant appealed to the High Court from the above decree.

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Mr. Woodroffe and Mr. Amser Ali (Baboos Ashootosh Dhur and Komola Kant Sen and Moulvie Murhumut Hossein with them) for the appellant.

The *Advocate-General*, offg. (Mr. Paul) and Mr. Bonnerjee (Munshis Mohammed Yusuff and Abdul Barry with them) for the respondent.

Mr. Woodroffe.—The plaintiffs in this suit pray for substantive and important consequential relief; their action therefore ought to have been brought upon a stamp of a value proportionate to the subject-matter of the suit, and the Judge was wrong in not rejecting the plaint summarily on finding the stamp insufficient—*Joy Narain Giree v. Greesh Chunder Mytee* (1).

(1) *Before Sir Richard Couch, Kt., Chief Justice, and Mr. Justice Ainslie.*

The 14th August 1874.

JOY NARAIN GREEE (PLAINTIFF) v.
GREESH CHUNDER MYTEE AND
OTHERS (DEFENDANTS).*

Court Fees Act (VII of 1870), Sch. ii, Art. 17, cl. 3—Stamp—Suit to set aside a Deed or Will—Declaratory Decree—Consequential Relief.

In a suit for confirmation of possession by declaration of proprietary right, and also to set aside a forged and invalid will, held that the plaintiff sought consequential relief over and above the declaratory decree prayed for, and therefore the petition of appeal ought to be engrossed on a stamp of proportionate value to the subject-matter of the suit.

CASE stated by the Deputy Registrar, and referred by the Taxing Officer under s. 5 of the Court Fees Act, 1870.

"This appeal is from an order of the lower Court in a suit 'for confirmation of possession by declaring

proprietary right to the properties, real and personal, as per schedule, and for setting aside a forged and invalid will,' or, according to the statement at the head of the grounds of appeal, 'for confirmation of possession and cancellation of a document dated the 26th Baisakh 1268.' The properties which form the subject of the suit are valued at Rs. 93,102-7. The Court fee paid is Rs. 20, which, the pleader on the part of the appellant (Baboo Ram Churn Mitter) urges, is the fee provided for such a suit by cl. 3, No. 17 of Sch. ii of the Court Fees Act of 1870. He states, moreover, that objection to that fee was taken before the lower Court, and overruled."

In stating and referring the case, cl. c. of para. iv of s. 7 of the Act which prescribes that the fee should be computed according to the amount at which the relief sought is valued in the plaint, was referred to as being that applicable to the suit; and the

* Regular appeal, No. 204 of 1874, from a decree of the Judge of Midnapur dated the 29th July 1874.

In the second place, the Judge below had no power to grant leave to the plaintiffs, under s. 18 of Act XX of 1863, to maintain this suit. He misapprehended the scope of the Act which applies only to endowments of a public character. It is

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case of *Thakoor Deen Tewarry v. Nawab Syed Ali Hossein Khan* (a) was cited to show that the prayer to have the deed set aside was one for substantive relief.

Mr. R. T. Allan and Baboos Keli Mohan Dass and Ram Churn Mitter for the appellants.

The respondents did not appear.

The opinion of the Court was delivered by

COUCH, C. J.—The Judicial Committee of the Privy Council appear to me to have been of opinion in the case of *Thakoor Deen Tewarry v. Nawab Syed Ali Hossein Khan* (a) that when a plaintiff alleges a deed not to be genuine, and asks to have the deed set aside, there is a prayer for substantial relief. They say that "on the whole they agree with the substance of both the decisions below that these deeds are not genuine and ought to be set aside;" and that the High Court ought not merely to have made a decree that "so much of the decree of the Court below as declares that the plaintiffs are the rightful owners of the property be confirmed," that is, the High Court was not right in making a merely declaratory decree. This appears to me to be an authority of the highest tribunal that, where a plaintiff asks to have a deed or will set aside, there is a prayer for substantial relief.

The clause in the schedule of the

Court Fees Act under which the appellant says that he has a right to affix to his petition of appeal a stamp of Rs. 20 is that "a plaint or memorandum of appeal in each of the following suits" may be on a stamp of Rs. 10; and one of the suits mentioned is "a suit to obtain a declaratory decree where no consequential relief is prayed, "If consequential relief is prayed, a stamp of Rs. 10 is not sufficient.

Here, according to the opinion of the Judicial Committee, consequential relief is prayed, and the appellant cannot relieve himself from the obligation to pay the full stamp by saying that he does not ask for consequential relief, and that he will be content with a decree of this Court merely declaring his right to obtain possession; and when we look at substance rather than form in this case, the suit is really to obtain consequential relief. The effect of it is that, whereas a person, if a will be valid, would be entitled under it to execution of an order of Her Majesty in Council, the plaintiff anticipating the claim for execution brings this suit, which really is to extinguish that right and to stop the party from obtaining execution of the order or decree. It is really a suit for something more than a declaration of title, it is to obtain what would be a substantial relief.

I think the stamp is not sufficient and that the petition of appeal must be stamped according to the value of the subject-matter of the suit.

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only when endowments have been transferred under ss. 4 to 7 of the Act that parties interested in them may come in and apply for leave to sue the trustee or manager thereof—*Bibee Kuneez Fatima v. Bibee Sahebjan* (1). This is apparent from the wording of the Act itself, which was passed for the purpose of relieving Boards of Revenue and the local agents in the Bengal and Madras Presidencies from the duties imposed on them respecting the management of religious appropriations by the Bengal Regulation XIX of 1810 and the Madras Regulation VII of 1817. S. 14 of Act XX of 1863 provides that “any person or persons interested in any mosque, temple or religious establishment, or in the performance of the worship or service thereof, or the trusts relating there to may . . . sue before the Civil Court, the trustee, manager, or superintendent of such mosque, temple, or religious establishment, or the member of any committee appointed under this Act for any misfeasance”

The section clearly contemplates those religious establishments which in some shape or other were, under the provisions of the old Regulation, subject to the superintendence, or in the possession, of the Boards of Revenue and local agents; and which by the Act in question were either transferred to individual trustees under s. 4, or to committees under s. 7. “The liability to be sued under this Act,” mentioned in s. 6, applies only to the trustees, managers, or superintendents to whom, whether directly under s. 4, or indirectly under s. 7, the Local Government transferred the powers and responsibilities of the Board of Revenue and the local agents. The use of the word “such” almost invariably in the sections referred to has no meaning otherwise. Now, the alleged endowment was created when the old Regulation was in force. If it had been regarded as a real endowment, or an endowment of a public character; the authorities would have at once taken charge of it. On the contrary it appears that, though the estate was nominally called a “wakf mehal,” the defendant used always to obtain pottas from the Collector in her own name as absolute proprietor. Therefore, if this be a trust, there can be no doubt that it is a

trust of a private character. The difference between these two kinds of trust is explained in the case of *Mahomed Munnoo Chowdree v. Mussamat Hajra Beebee* (1). The alleged endowment therefore does not come within the scope of Act XX of 1863. Besides, the plaintiffs have not proved one single circumstance which would entitle them to maintain this suit—*Bibee Kunees Fatima v. Bibee Sahabjan* (2). But I put the case higher and submit this is no wakf at all. A wakf under the Mahomedan law means a dedication of property solely to the worship of God and the relinquishment by the owner of all proprietary right therein—*Abdul Ganne Kasam v. Hussien Miya Rahimtula* (3) and *Mookummud Sadiq v. Mookummud Ali* (4). Is that so here? The dedication in this case is not to the service of God alone, nor has the proprietress absolutely divested herself of all right over or interest in the property. On the contrary, she expressly reserves to herself in the alleged wakfnama the power of creating further charges on the estate by granting pensions to her servants. She also sets apart for herself a portion of the profits. It is submitted therefore that this is not a valid wakf under the Mahomedan law, and the defendant has consequently the power to revoke it whenever she likes. Furthermore the lady expressly denies ever having intended to create a real wakf; she says she meant the document merely as a will to have effect after her decease for the purpose of perpetuating certain ceremonies for the benefit of her mother's soul. Intention is a necessary element under the Shiah law to constitute a valid wakf: see Baillie's Imameeha Law, p. 211; Tagore Law Lectures for 1874, p. 468; 1 Querry, Droit Musulman, p. 575. The executant is alive; she swears that she intended the deed to have operation only after her death, and that she never meant to divest herself of all her proprietary rights which is the essential characteristic of a real wakf; and her conduct throughout in dealing with the property as an absolute owner since the execution of the deed, corroborates her statement and is evidence of the fact that it is a mere nominal endowment—*Gunga Narain*

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(1) S. D. A., 1858, Pt. ii, 1218.

(2) 8 W. R., 313.

(3) 10 Bom. H. C. Rep. 7.

(4) 1 Sel. Rep., 17.

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Sircar v. Brindaban Chunder Kur Thowdhry (1). The application of a portion of the profits of the estate to charitable purposes, or the performance of certain religious ceremonies in a shrine with in her own house, certainly will not attach all the liabilities or characteristics of real endowment to her property, or divest her of her rights of ownership therein, and reduce her thus to absolute beggary—*Muddun Lal v. Sreemutti Komul Bibes* (2) and *Maharanees Brojosoondery Debia v. Ranees Luckmees Koonwaree* (3). The evidence of one of the plaintiffs (Ashgur

(1) 3 W. R., 142.

(2) 8 W. R., 42.

(3) PRIVY COUNCIL.*

The 8th May 1873.

MAHARANEES BROJOSOONDERY
DEBIA (PLAINTIFF) v. RANEE LUCH-
MEE KOONWAREE AND OTHERS
(DEFENDANTS.)

[On Appeal from the High Court of
Judicature at Fort William in Bengal.]

*Religious Endowment—Purchase in
name of Idol—Alienation—Limitation.*

The plaintiff sued as the sebat of a certain idol to recover possession of a zemindari by setting aside an alienation thereof effected by his grandmother, on the ground that it was debutter property dedicated to the idol, and consequently inalienable. It appeared that the property in dispute was purchased by the grandfather of the plaintiff in the name of the idol, which was set up merely for his private worship in his own house without any priests to perform regularly any religious service for the public benefit of Hindus, and that the property had been dealt with all along as his own private property. *Held*, that it was a mere nominal endowment, and consequently the alienation thereof was not invalid. *Held* also, that a property purchased by a man in the name of his own idol, which no one except himself has the power or right to worship, is not the property of the idol, but the property of the person who purchased it. *Held* on

the facts, that the suit was barred by limitation.

APPEAL from a decision of the High Court at Calcutta (Norman and E. Jackson, JJ.) dated 5th January 1869 (a).

The facts of the case are sufficiently stated in the judgment of their Lordships, which was as follows:—

This suit was commenced on the 11th November 1867. It was brought by Maharaja Govindnath Roy, who was the grandson and heir through adoption of Maharaja Ramnath, *alias* Biswanath Roy. The suit is against Ranees Luckmees Koonwaree and others. It is brought by the plaintiff as the sebat of the idol Shyamsoonder Thakoor, to recover a certain zemindari in Zilla Rajshahye, which, he contends, was improperly assigned and sold by his grandmother Maharanees Kristomonee, the widow of Biswanath Roy.

The two important questions in this case are, first, whether the property was endowed for a religious purpose; and in the next place, whether the suit is barred by limitation.

With reference to the endowment, it appears that on the 17th of Jaisti 1206, about the year 1799, the semin-

* *Present*.—SIR J. W. COLVILLE, SIR B. PHACOCK, SIR M. E. SMITH, AND SIR L. PEARL.

(a) 2 B. L. R., A. C., 155.

Ally), who states that the defendant told him she had executed the wakfuama to protect the property from creditors, gives another

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dari was sold for arrears of Government revenue. It was purchased for Rs. 5,005, and the name of the purchaser was entered as "Shyamsunder Thakoor," that is the idol, "by the pen of Rughoonath Nundee." It does not appear who Rughoonath Nundee was, but he merely signed on behalf of the idol as the purchaser. Where the Rs. 5,005 came from does not very clearly appear, but there can be no doubt from the whole of the case that the money was supplied by the Maharaja Biswanath. On the 18th August 1802 there was a bill of sale executed by Brojokishore Shaha, said to be a purchaser of the zemindari, in favor of Rughoonath Nundee; but how Brojokishore Shaha got the property does not appear. How the idol, who had purchased at the auction, transferred his property, or by whom the property was transferred on behalf of the idol, does not appear; but it appears that Brojokishore Shaha reconveyed or conveyed the property to Rughoonath Nundee as the gomasta. Rughoonath Nundee is described (I do not know whether it is very material) merely as the gomasta of the idol, whereas the Maharaja is described as sebaite. Whether there is any material distinction between a gomasta and a sebaite, I am not aware, nor is it, I think, very important. Now the bill of sale says:—"In the course of business by Brojokishore Shaha, son of" &c., "in favor of Rughoonath Nundee, gomasta of the most worshipful Shyamsunder," that is the idol. "Having failed to clear and prepare, and pay the Government revenue of our purchased zemindari Pergunna Soojannggur Sirkar Bhuggo

Korat, within Chakla Bhadoora, the sudder land revenue of which said pergunna, as per allotment, is recorded at Rs. 4,742-4-4, and whereas there is, no possibility of our doing so next year we do of our own will and accord, in full possession of our reason and senses, in health of body, and without compulsion, sell to you" that is, to Rughoonath Nundee, "the pergunna aforesaid, for a full consideration of Rs. 5,901." Where that money came from does not appear, but there is no doubt that it was the money of the Maharaja. A certificate of that sale was put in evidence, which does not carry the case any further, and the deed was registered.

On the 24th of Chaitra 1211, a deed was executed by Rughoonath Nundee, conveying the property to the idol and the Maharaja sebaite. He says:—"This deed of agreement is executed in the course of business. Being appointed in the office of gomasta,"—there he calls himself again 'gomasta'—"on the part of the idol, I have purchased, in the name of the god, Pergunna Soojannggur, from Tikhum Roy and Brojokishore, I having myself caused the bill of sale to be executed, my name is recorded in the bill of sale, certificate of sale and bill of mutation of names as gomasta on the part of the god. And I now present the bill of sale, &c., under the hand of the Roy and Shaha before you, to enable you to present a petition to have the said pergunna entered as a zemindari in the name of the god and your own name recorded as the sebaite thereof; and I accordingly agree and write this to the intent that you may have the names of the Roy and Shaha struck off from the

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due to the motive which led to the creation of this nominal endowment. The defendant is not precluded from setting up

Collectorate in respect of the said pergunna, and have your own inserted in the office as a semindari in the name of the god, and yourself as the sebaite thereof." That document was also registered, and therefore anybody could have discovered that the deed had been executed.

But the question is whether there is any evidence of an endowment properly so called. Now what is the evidence of an endowment? This was clearly not an endowment for the benefit of the public. The idol was not set up for the benefit of public worship. There are no priests appointed, no Brahmans who have any legal interest whatever in the fund. It is not like a temple endowed for the support of Brahmans, for the purpose of performing religious service for the benefit of any Hindu who might please to go there. It is simply an idol set up by the Maharaja, apparently in his own house. And for what purpose? Why, for his own worship. We constantly have suits claiming certain turns of worship, but here there is no turn or right of worship established. There is nothing stated in any way to show that the Maharaja intended that the idol should be kept up for the benefit of his heirs in perpetuity; and before it can be established that lands have been endowed in perpetuity, so that they can never be sold and must be tied up in perpetuity, some clear evidence of an endowment must be given. What are the objects of the endowment? None of the essentials of an endowment are stated. The Maharaja appears to have purchased the property in the name of the idol,

and that is all. Then he deals with the funds of the idol as if they were his own property. There is no evidence at all of any of the essentials of an endowment in favor of the idol.

In the case of *Muhatab Chand v. Mirdad Ali* (a), which was a very similar case, it was held that, when an endowment is merely nominal and indications of personal appropriation and exercise of proprietary right are found, a sale of the property is valid under the Hindu law.

It appears, therefore, to their Lordships, upon the authority of that case, and upon the principle of endowments that this was not an endowment by the Maharaja in perpetuity for the benefit of the idol, so as to establish that the property so conveyed to the idol was to be the property of the idol for ever, and that no body could alienate it. Suppose the Maharaja had established the idol in his house, would anybody pretend that he could not sell his house? Well, then, what would become of the idol's temple in the house? He could sell the house notwithstanding he had put an idol there; and what would become of the idol itself? Here there was no endowment, no priests no public, no one legally interested in the worship of this idol, except the Maharaja himself, and nothing to show that the Maharaja intended to establish it for the benefit of his sons or heirs, or anybody else, in perpetuity.

If there was not an endowment, the case appears to be very clear. The Maharaja having purchased the property in the name of the idol, mortgaged it to Komul Lochun Nundee

the true facts of the case, now that it is attempted to oust her from her property under the deed—*Mussamat Udey Kunwar v. Mussamat Ladu* (1).

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for a sum of Rs. 32,000. Komul Lochun, not having been repaid, took steps to foreclose the estate; and the period of foreclosure was about to elapse when, the Raja having died, and having appointed his widow, Kristomonee, the manager and owner of the property, she came in and made an arrangement with Komul Lochun to extend the period; and she afterwards borrowed from Rajas Woodmunt Sing and Janokeram Sing Rs. 46,400, with which Komul Lochun was paid off. The conditional sale was to pay off a debt due from her husband to Komul Lochun. Now, as a widow, she was entitled to alienate the property for the purpose of paying and discharging her husband's debts. After that, the period for the repayment of the money to Woodmunt Sing and Janokeram Sing having elapsed, they foreclosed the estate against the widow Kristomonee, and brought a suit, and recovered possession of the land, and were put into possession forty-seven years before the commencement of this suit.

The defendants claim under Rajas Woodmunt Sing and Janokeram Sing. Raja Janokeram Sing died, leaving Raja Woodmunt Sing his heir; and the whole property then became established in him. He died, leaving two sons, and the sons conveyed the property to the defendants. It is unnecessary, however, to enter into the title of the defendants.

The question is, has the plaintiff any right to recover this property? The widow made a valid sale of it;

and, even without the Statute of Limitation, the defendants are entitled to it.

The Courts, below have both held that there was no actual endowment. The principal Sudder Ameen (although possibly all his reasons may not be correct) says:—"It is simply this that the grandfather of the deceased purchased the property claimed in the name of the idol." Then he held that there was not an endowment, and that the property was the private property of the grandfather. The High Court say:—"No evidence has been given to show that there ever was any formal dedication of the property to the idol. It is a mere purchase in the name of the idol. From the time of the purchase of the property, Raja Biswanath Roy appears to have dealt with it as his own.

In the case of *Gosain v. Gosain* (a), it was held that if a Hindu purchase property in the name of his son, the property is not vested in the son, but remains vested in the father who purchased; and so with regard to an idol. If a man merely purchases property in the name of his own idol, whom no one except himself has the power or right to worship, the property is not the property of the idol, but the property of the person who purchased it. The High Court say:—"From the time of the purchase of the property, Raja Biswanath Roy appears to have dealt with it as his own. In 1802 it was conveyed or mortgaged to one

(1) 6 B. L. R., 283; S. C., 13 Moore's L. A., 585.

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Mr. Ameer Ali on the same side.—The deed of 1852 did not constitute a valid and effectual endowment under the Mahomedan law. The wakf which it purported to create was void from the beginning, and consequently does not bind the defendant at all. If the lady is a Sunni, as she alleges herself to be and the endowment is governed by the provisions of the Sunni law, the dedication is void as being impious: for a dedication to an imambara where Sunni saints are anathematized is regarded by the Sunnis as sinful. In the present case, it is in evidence that ceremonies are performed in the defendant's imambara, for the due performance of which the *teberrā* or anathema on the three first calphs is essentially necessary. The wakf is likewise void under the Shiah law, though for other reasons. According to the Shiachs, there are four essential conditions to constitute a valid wakf; see Baillie's Inameea Law, p. 218; Tagore Law Lectures for 1874, p. 471; 1 Querry, Droit Musulman, pp. 582-583. All these elements are entirely wanting in the present case, for the dedication is neither absolute nor unconditional, nor has the

Bheekum Roy, and in 1812 it was mortgaged, apparently for the Raja's purposes. There is no proof that either the first or the second mortgage was executed in any way for the purposes of the worship of the idol, or for the performance of any trust connected with it. For all that appears, the money was raised for the private purposes of the Raja. No evidence has been given to show that the revenue of the property was expended for the purposes of the idol, and the pleader for the appellant, when arguing the case before us, was not prepared to go into evidence upon that point. We do not mean to rest our decision of the case on that point. But we may observe that we do not see any reason to doubt the correctness of the decision of the Principal Sudder Ameen that there was no real endowment."

Now both the Courts below have found that there was no real endow-

ment, and their Lordships entirely concur in that finding. There was, therefore, nothing to deprive the purchaser of the power of alienation.

It is scarcely necessary to advert to the question of limitation. In this case forty-seven years have elapsed since those under whom the defendants claim purchased the property *bona fide*, under the belief that the foreclosure in favor of Rajas Woodmunt Sing and Janokeram Sing was a valid title in those parties, and they purchased the property for a valuable consideration. The property has been out of the possession of the Maharaja's family for upwards of forty-seven years, and limitation is clearly a bar to the suit.

Under these circumstances their Lordships will humbly advise Her Majesty to affirm the decision of the High Court, with the costs of this appeal.

owner entirely divested herself of all interest therein. The Sunni law allows the donor to reserve to himself a certain interest in the endowed property, but under the Shiah law such a reservation absolutely avoids the wakf; see Baillie's *Imameea Law*, p. 218; *Mafatih*, p. 416; and the chapters on wakf in the *Irshad-i-Allamah* and the *Jama-ush-shattat*. Besides, the Shiah law requires, that the persons entitled to the benefit of the trust should be distinctly indicated—*Tagoyre Law Lectures for 1874*, pp. 467 to 471; 1 *Querry*, *Droit Musalman*, pp. 578, 582,—and should not be liable to extinction; see *Tagore Law Lectures for 1874*, p. 118. In this case if the servants are to be supposed the beneficiaries of the trust, they are liable to extinction; if there are other persons besides them entitled to the benefit of the trust, they are not distinctly indicated. In the case of *Syed Khodabundha Khan v. Mussamut Oomatul Fatima* (1), it was held that a provision for the lighting of the testator's tomb, and reading of the Koran, could not be regarded as creating an absolute wakf. An imambara of this kind is not a public endowment. Public endowments under the Mahomedan law are sufficiently indicated in Baillie's *Imameea Law*, p. 215.

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The *Advocate-General*, for the respondents.—This is a good wakf : operation was given to it by registration and mutation of names ; therefore, the change of possession, which is contemplated by the Mahomedan law, actually took place, and the conditions necessary to constitute a valid wakf have been complied with. The defendant cannot revoke the dedication now—*Abul Hassan v. Haji Mahomed Masih Karbalai* (2). The fact of her having constituted herself a joint-mutawalli with Jigri Khanum does not vitiate the endowment, for under the Shiah, as well as the Sunni law, a donor can retain the management of the wakf in his own hands—Baillie's *Imameea Law*, p. 214. The defendant was aware of the contents and effect of the deed ; she is precluded therefore from turning round and denying now all her previous statements. The case of *Gunga Narain Sircar v. Brindaban Chunder Kur Chowdhry* (3) is inapplicable, for there

(1) S. D. A., 1857, Pt. I, p. 235.

(2) 5. Sel. Rep., 82.

(3) 3 W. R., 142

1875 the conduct, which was held to explain the intention of the donor, was contemporaneous. [MITTER, J.—Acts done at or about the time may be taken into consideration.] Yes; but here the defendant's dealings with the wakf property as proprietor commenced long after the execution of the deed. Besides, it being a voluntary settlement, defendant cannot now set up the plea of fraud or ignorance to avoid the deed. The case of *Mussamut Udey Kumwar v. Mussamut Eader* (1) only shows this that a party whom it is attempted to bind by a deed may show that it was intended to be something different from what upon its face it purported to be. The onus was therefore clearly on the defendant to prove that the dedication was a sham, but this onus has not been discharged. The case of *Wasiq Uli Khan v. Government* (2) is analogous to this. [MITTER, J.—There is another point, whether the plaintiffs could be appointed mutawallies when the Act merely provides for the appointment of a manager.] It does not matter whether the Act applies or not. The defendant has been guilty of misfeasance, and, under the general law of the Mahomedans, she is liable to removal.

Munshi Mahommed Yusuff on the same side—For the purpose of maintaining a suit under Act XX of 1863, it was not necessary for the plaintiffs to show that the imambara was ever under the control of the Board of Revenue—*Ganes Sing v. Ramgopal Sing* (3). Endowments of imambaras obtain only amongst the Shiahs, to which sect the defendant's family belonged. The Shiah law therefore must be taken to govern this case, and according to that law, the deed creates a valid and irrevocable wakf—*Hidait-oon-nissa v. Syub Afzul Hossain* (4).

Mr. Ameer Ali in reply.—The cases which have been cited are founded on Sunni law, and have therefore no application to the present case, where the plaintiffs have elected to be governed by the Shiah law. As to the question of the defendant's knowledge of the nature and effect of the deed at the time of execution, the onus was clearly on the plaintiffs, especially when it

(1) 6 B. L. R., 283; S. C., 13 Moore's L. A., 585. (2) 6 Sel. Rep., 110.

(3) 5 B. L. R., App., 55.

(4) 2 N. W. R., 420.

is said that the dedication was in effect a voluntary settlement which, if held binding, would result in the absolute beggary of the lady—*Price v. Price* (1). In dealing with cases involving the interests of pardanashin ladies, Courts of justice require the strictest proof of their knowledge and comprehension of the acts by which they are sought to be bound—*Manohar Das v. Bhagabati Dasi* (2). The defendant has stated on oath that she was not aware of the nature of the deed until the institution of this suit. No evidence has been given by the plaintiffs to rebut this statement; on the contrary the evidence on their side tends to corroborate defendant's statement.

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The judgment of the Court was delivered by

GLOVER, J., (who, after stating the facts, continued) :—The first point we have to consider is her objection that this was not a case coming under Act XX of 1863, and that the Judge had no jurisdiction to try it.

Now Act XX of 1863 was passed, as appears from its preamble, to relieve the Boards of Revenue and local agents of the duties imposed upon them by Regulation XIX of 1810, which Regulation so far as related to endowments for the support of mosques, Hindu temples, or other religious purposes, was by it repealed. The endowments, &c., referred to in the Act, ss. 3, 4, 5, are declared to be the same as those to which the Regulation of 1810 was applicable, and s. 16 of that Regulation specifies the kind of endowment which should be made subject to its control and supervision. The words of the section are :—"It is to be clearly understood that the object of the present Regulation is solely to provide for the due appropriation of lands granted for public purposes." Was then the tauliatnama executed by Delroos Banoo Begum an appropriation of lands for public purposes, so as to bring it within the purview of Act XX of 1863?

The Judge says :—"I apprehend that a private endowment is one in which the benefits are appropriated wholly or partly to

(1) 1 DeG., M. & G., 308.

(2) 1 B. L. R., O. C., 28.

1875 individuals as distinguished from the general Mahomedan public;" and again:—"The difference between a private and a public endowment is explained in *Dalrymple v. Khoondkar Azeezul Islam* (1). Now the terms of the tauliatnama are not uncertain or ambiguous; the wakf constituted thereby fulfils all the requisite conditions; and the acts of the defendant in registering the deed, in obtaining the transfer of names in the Collector's books, and in managing the property throughout the intervening twenty years under the appellation of mutawalli, sufficiently prove that possession passes from herself as malik to herself and Jigri Khanum as mutawallis. It is clear that a valid wakf once completed cannot be revoked; and it is certainly not open now to the defendant to say that she misunderstood the effect of the words she used, and the acts by which she consummated the wakf. The endowment certainly is a religious establishment within the meaning of Act XX of 1863."

I doubt whether *Dalrymple v. Khoondkar Azeezul Islam* (1) lays down any rule, or gives any explanation as to the difference between public and private endowments for religious purposes. It rather deals with the difference between a mutawalli considered merely as a superintendent of a religious establishment, and one who combines both a personal and an official interest in the endowment, and, when the appropriation has been made partly for religious and partly for secular purposes. A public endowment for religious uses is one which distributes its benefits to all men of all classes professing a defined form of religion: a similar endowment for pious and charitable purposes generally would include all members of the community who chose to avail themselves of the means afforded them by the appropriator; every one would have an equal right to participate, and that at all times and at all seasons. Now what is the case here? The tauliatnama executed by the defendants Delroos Banoo Begum is to the following effect:—

She begins by saying that she considers it incumbent on her to continue and perpetuate the ceremonies for pious uses such as *fatiha*, *haziri*, &c., which she says is the fixed and settled

(1) S. D. A., 1858, Pt. i., 586.

usage of her family. She then details the ceremonies, &c., on which the larger part of the income is to be spent : they are the *fatihās* of Mahomed and of the twelve Imams, the expenses of the first ten days of the Mohurram and of the holidays, the repairs of the imambara and of the tombs, by which she means her mother's tomb. Of the rest of the income, part is to be expended in paying and pensioning the servants of the estate (the property was a large one, yielding nearly three quarters of a lakh of rupees annually), and part is to be applied to the mutawallis' own uses. She appoints herself and her sister-in-law Jigri Khanum joint mutawalies, with power to the survivor, and makes arrangements for the appointment of a superintendent after her death.

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This document was executed on the 10th of September 1852, at a time, that is, when Regulation XIX of 1810 was in force, and when, according to that Regulation, the superintendence of the endowment, if a public one, would have been vested in the Board of Revenue and Board of Commissioners, who would have been bound to take order that the endowment was duly appropriated to the purpose for which it had been destined. Now it is not contended in this case that any such superintendence was ever exercised by the Boards in question, or that they ever interfered in any way with the appropriation, and this too when the tauliatnama or endowment deed had been publicly registered, and application had been made to the Collector to substitute the names of the mutewallis in his mutation register for the name of the former proprietor. It seems clear from this that the authorities did not at the time when the endowment was made, consider that it was of a public character coming under the provisions of Regulation XIX. Nor, when Act XX of 1863 was passed, did the Local Government make any special provision under ss. 4 to 7, as contemplated by s. 3 of the Act, which it was bound to have done, had the endowment been one of a public nature and for public purposes coming under the Regulation of 1810 : no transfer was made under s. 4 of Act XX of 1863. In short, the defendant was never interfered with under either Act or Regulation.

Then as to the wording of the tauliatnama itself. It

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seems to me that there is nothing in it that contemplates an appropriation for the "general benefit," whilst the defendant's object in making it is further explained in her deposition, which is on the record. It was to perpetuate certain ceremonies in commemoration of her mother's death according to the custom of the family, which was of the Shiah sect, and in the regular performance of which the defendant, who had married a husband of the Sunni sect, probably saw some future difficulty. The prayers, &c., to be recited were not to be made in any mosque or regular place of worship, but in the defendant's own *imambara* (a building admittedly within the precincts of her dwelling-house), and the expenses of the first ten days of the *Mohurram* were matters of an essentially private character. Mahomedans of both Sunni and Shiah sects are in the habit of performing these *Mohurram* ceremonies according to their means, and the richer class of them no doubt spend large sums in commemoration of the deaths of Hussan and Hossein: but these ceremonies are personal matters only, and the general public have no right to take part in them. An *imambara*, moreover, is not a public place of worship as is a mosque or temple, but an apartment in a private house set apart no doubt for the performance of certain *Mohurram* ceremonies, but no more open to the general public than a private oratory in England would be. As a matter of fact strangers are ordinarily excluded from these celebrations. Doles of a particular kind of provision are no doubt distributed at this time to the fakirs and beggars in attendance, but this is a matter of individual charity; there is no general distribution in which all the poor have a claim to share.

It appears to me, after reading the terms of the *tau/iatnama*, and considering the evidence which has been adduced as to the way in which its provisions were understood and carried out, that the appropriation of Delroos Banoo Begum was not of a public character, and that Act XX of 1863 does not apply to it. It follows that the Judge had no authority to give the plaintiff leave to sue, and that his decision was *ultra vires*.

This would be sufficient to dispose of the present appeal, but as we have been informed by the respondent's counsel that the

case will be carried further, it will be as well to give our opinion on the other points which have been argued before us.

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And first as to the way in which the suit has been brought. The plaint is on a 10-rupee stamp, on the ground that a declaratory decree only is sought; but this is not so. The plaintiffs ask for distinct and important consequential relief; they ask not only that the defendant may be declared to have wasted the endowment, and thereby to have betrayed her trust, but also that she may be turned out of her mutawalliship, and they, the plaintiffs, be appointed in her room. The plaintiffs say that what they claim does not admit of being properly estimated by a money-value; but this is not so. Under the tauliatnama the mutawallis were to receive six twenty-eighths of the produce of the estate, a very considerable sum, and the plaintiffs claim to this share as an appurtenance to the office of mutawalli was easily to be estimated in money. I am of opinion that the plaint ought to have been engrossed on a stamp of proper value.

Then as to the plaintiffs' interest, I very much doubt whether they, or any one else, could have claimed as a matter of right to be present at the imambara on the occasion of the Mohurrum ceremonies, or to have participated in the charities then disbursed. I consider both to have been of a private character, and that the defendant had the right to forbid, had she been so minded, any one from entering her premises on these occasions. In any case all the plaintiffs would not have had the right, even if the two nephews, as being of the family, possessed it.

I now come to the substantial question between the parties as to whether this appropriation by the defendant Delroos Banoo Begum was a legally constituted wakf. I agree with the Judge in thinking that so far as words go, it was a wakf which would have bound the appropriator: but what we have to consider is, whether it was intended by the appropriator Delroos Banoo Begum to operate as such, and whether she knew that by executing the tauliatnama she then and there divested herself of all her proprietary right in her large and valuable estate, and became only a co-superintendent with her sister-in-law, with a comparatively small allowance for maintenance.

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The Judge holds that the defendant cannot now be allowed to say that she misunderstood the effect of the words she used, or of the acts by which she consummated the wakf, and under ordinary circumstances no doubt a person would be rightly presumed to have known the consequence of his own deliberate act; but in this case the matter is somewhat different. The defendant is a pardanashin Mahomedan lady, unable to read and write, and generally ignorant, as are most of her class. She has been examined, and she swears positively that she did not understand the meaning of the deed which she executed. She admits her wish to keep her estate for the purpose of perpetuating certain ceremonies in memory of her mother, and out of the hands of her legal heirs, and that to this end she, by the advice of her confidential servant Ali Jameen, signed a deed which she was told would have that effect. She swears positively that the tauliatnama was only read over to her in Persian, a language which she did not understand, and that she had no idea of divesting herself by it of her proprietary rights. No evidence has been given to rebut this statement. Only one witness to the tauliatnama, Abdool Azeez (summoned by the defendant), has been examined, and he does not prove that the deed was ever read to the Begum in Hindustani, a language which she understood, or that its purport was explained to her. Her own acts have been from the first absolutely inconsistent with a knowledge that she had divested herself of her rights as proprietor by the tauliatnama; from a time shortly after its execution, we find her dealing with the property just as if it were still her own, selling, buying, borrowing, granting mukarrari leases, and exercising all the usual rights of ownership, and making everything as public as possible by registering the documents affecting these conveyances. I find moreover that, long after the tauliatnama was executed (namely in 1871), the Collector of the 24-Pergunnas gave pottas to Delroos Banoo Begum,— and this is a further argument in favor of the property never having been considered an endowment for public purposes under Regulation XIX of 1810,— and treated her as the proprietor of her estate. It is moreover hardly likely that, had Delroos Banoo Begum known what was

the real effect of making a wakf, she would have headed her receipts for rents paid by the ryots with her name as mutawalli and a description of the estate as a wakf mehal, and still have gone on disposing of the property at her pleasure and as if she had made no wakf at all. From first to last, as it seems to me, her acts denote a person endeavoring to make such an arrangement of her property, as would defeat the claims of her heirs, and permit of the estate being retained for particular purposes, but always considering that she still retained the right to do what she pleased with the property so long as she lived.

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I think therefore that the burthen of proof was shifted, and that the plaintiffs ought to have given some evidence to show that Delroos Banoo Begum understood the true nature of a wakf appropriation, and that when she executed the tauliat-nama she knew that by it she divested herself at once of all her large property. It is clear that she had no professional assistance at the time. Ali Jameen is described as an old and trustworthy servant, but not a lawyer; and none of the witnesses examined for the plaintiff's prove that the Begum in creating the wakf was in any way cognizant of the effect of her act. It has been generally held in this country that pardanashin ladies have a claim to special consideration, particularly in cases when they deny on oath an effectual knowledge of documents which they are said to have made, and a precedent was quoted to us—*Price v. Price* (1)—where, in the case of an illiterate husband making a gift of his whole property to his wife, the writer of the document being the only person present who could write, and he not being a professional man, the Court of Chancery required to be satisfied that the purport of the deed had been properly explained to the husband, and that he knew what he was about, and not being so satisfied, dismissed the wife's petition.

In this case we have an illiterate and prejudiced woman, with no professional assistance, executing a deed written in a language which she did not understand, and which, as she swears, was not explained to her by which she completely divests herself of the whole of a large property, and then immediately sets to

(1) 1 DeG., M. & G., 308.

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work to do a series of acts which would have the effect of turning her out of the mutawalliship she had created for herself. and of turning her upon the world absolutely penniless. Before we come to such conclusion, we ought to have very distinct proof that the real purport of the wakf deed was properly explained to Delroos Banoo Begum, and that she knew what she was about; and it is not too much to say that no such proof has been attempted to be given by the plaintiffs.

It does not appear necessary to go further than this. As to the objections raised by the defendant that the wakf was indefinite, and therefore void, I think it enough to say that it, in my judgment, fully answered all the requirements of the Imameeh law, and that, if it had been really and knowingly executed, it would have bound Delroos Banoo Begum without the power of revocation.

I think that this appeal must be allowed, and the Judge's decision in favor of the plaintiffs be reversed with costs.

Appeal allowed.

PRIVY COUNCIL.

THAKOOR JEEBNATH SING (PLAINTIFF) v. THE COURT OF
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March 10, 11, & 12. [On Appeal from the High Court of Judicature at Fort William in Bengal.]

Hindu Law—Mitakshara—Inheritance—Appointment of a Daughter.

By the Hindu law of inheritance as contained in the Mitakshara, the great-grandson of the great-great-great-grandfather of the deceased is a nearer heir to the deceased than his father's sister's son.

The case of *Bhya Ram Sing v. Agar Sing* (1) followed.

The custom of Hindu law, under which a father, in default of male issue, might appoint a daughter to be as a son, or appoint her to raise a son for him, if not obsolete, as appears to be the opinion of the text-writers, is one which in modern times does not seem to have been brought under the consideration of the Courts of Justice in India.

* *Present:* SIR J. W. COLVILLE, SIR B. PEACOCK, and SIR M. E. SMITH.
 (1) 5 B. L. R., 293; S. C., 13 Moore's I. A., 373.

Assuming the custom to exist, inasmuch as it breaks in upon the general rules of succession, whoever claims by virtue of it to succeed as heir, must bring himself clearly within it. There seems to be no sufficient authority for holding that a father may delegate the power to appoint.

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APPEAL from a decision of the High Court at Calcutta (Couch, C.J., and Jackson, and Glover, J.J.), dated 12th July 1870, confirming a decision of the Deputy Commissioner of Lohardugga, dated 24th February 1869.

The suit, out of which this appeal arose, was brought in the Court of the Deputy Commissioner of Lohardugga by the plaintiff Thakoor Jeebnath Sing as heir of Raja Trilokenath Sing, deceased, for possession of the raj or estate of Ramgurh, with the property, moveable and immoveable, appertaining thereto, which had belonged to the deceased Raja at his death. The defendants in the suit were, first, the Court of Wards, who had taken charge of the estate until the question as to the right of inheritance should be decided; second, Brum Narain Sing, who alleged a preferable title in himself as a nearer relative in the male line; and third, Maharani Heernath Kooowuree, the mother of Trilokenath Sing. The second defendant having died during the pendency of the appeal, his son Nam Narain Sing had been substituted in his place. The third defendant had also died, and her claims were not in issue on this appeal.

It was agreed by the plaintiff Jeebnath and the defendant Brum Narain that the Ramgurh estate is an indivisible raj descending to the nearest male heir to the exclusion of females. The contention between them was as to their respective rights as nearest male heir.

The title made by the plaintiff in his plaint was of a two-fold character. His first ground was that, as son of the sister of Raja Trilokenath's father, he was, according to the Mitakshara law, which governs the succession, a nearer heir than Brum Narain, who claimed as great-grandson of the great-grandfather of Raja Trilokenath's grandfather. He further contended that, if not the nearest heir by the ordinary rules of succession, he was made an heir by the act of his grandfather Maharaja Sidnath Sing, who, in accordance with a custom of Hindu law, had appointed his daughter, the plaintiff's mother, to raise up

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male issue to him. The part of his 'plaint in which the plaintiff set forth, somewhat obscurely, the grounds on which he rested this alternative claim, will be found recited in their Lordships' judgment.

The case came on for hearing before the Deputy Commissioner of Lohordugga, who dismissed the plaintiff's suit with costs. He held that the plaintiff had not succeeded in establishing his title as appointed heir, and that by the rules of inheritance laid down in the Mitakshara, the defendant Brum Narain was entitled to the succession.

From this decision the plaintiff appealed to the High Court, but his appeal was dismissed on the 12th July 1870 (1), and from that decision the plaintiff appealed to Her Majesty in Council.

Mr. *Leith*, Q.C., and Mr. *J. D. Bell* for the appellant.—With regard to the claim of the appellant as nearest male heir under the Hindu law of succession, it must be admitted that there are three decisions of the Privy Council unfavorable to him, namely, *Rutcheputty Dutt Iha v. Rajundur Narain Ias* (2), *Rany Srimuty Dibeah v. Rany Koond Luta* (3), and *Bhya Ram Sing v. Agar Sing* (4). The first of these cases however was decided with reference to the Mithila law of succession, and the second case was decided with reference to the law of Dayabhaga. But the third case was decided under the Mitakshara, and is therefore very strong authority against the plaintiff's general claim to inherit in preference to the defendant Brum Narain as a nearer heir.

With reference to the plaintiff's title as son of an appointed daughter, they referred to the Institutes of Menu, Chap. ix, ss. 127, 133; and to the Mitakshara, Chap. i, s. 11, cl. 3, as supporting the plaintiff's contention.

Mr. *Cowie*, Q.C., and Mr. *Doynes*, for the respondent Nam Narain Sing, were not called upon.

(1) 5 B. L. R., 442.

(2) 2 Moore's J. A., 132.

(3) 4 Moore's J. A., 292.

(4) 5 B. L. R. 293; S. C.; 13 Moore's J. A., 373.

The judgment of their Lordships was delivered by

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Sir M. E. SMITH.—This was a suit brought by Thakoor Jeebnath Sing against Baboo Brum Narain Sing, represented by the Court of Wards, and the Maharani Heeranath Koowure, to recover the possession of the raj of Ramgurh, which is an impartible raj. The principal question raised in the suit turned upon the Hindu law of inheritance, and was whether the plaintiff Jeebnath Sing or Baboo Brum Narain Sing was entitled to succeed the Raja Trilokenath, who was the last proprietor of the raj. Raja Trilokenath died childless, and, indeed, a minor. The appellant Jeebnath Sing claims as father's sister's son, and no doubt he is a nearer relative, in one sense, to the deceased Raja than the respondent Brum Narain Sing : going back to the common ancestor, Brum Narain is the great-grandson of that common ancestor.

It was admitted by Mr. Leith in argument that the case, which was lately decided by this tribunal, of *Bhya Ram Sing v. Agar Sing* (1), was an authority decisively against the appellant's claim. It is immaterial to consider whether Brumnarain was a sapinda or samanodaka, because he was clearly in one of those two classes, and whether in one or the other he was in the line of male descendants from the common ancestor, and the decision referred to is that this line must be exhausted before bandhus are resorted to, in order to discover the heir of the last proprietor. Jeebnath Sing is a bandhu or cognate only, and therefore he cannot take as long as there is either a sapinda or a samanodaka in existence. The case, therefore, to which Mr. Leith referred, of *Bhya Ram Sing v. Agar Sing* (1), has really decided the appeal, so far as that question is concerned, against the appellant, and that case in principle followed two previous cases—the *Rutshputty Dutt Tha v. Rajunder Narain Rae* (2) and the other *Rany Srimuty Dibeah v. Rany Koond Lutta* (3).

The other point which Mr. Leith raised was this :—That assuming the appellant, Jeebnath was not the nearest heir according

(1) 5 B. L. R., 293., S. C., 13 Moore's I. A., 373.

(2) 2 Moore's I. A., 132.

(3) 4 Moore's I. A., 292.

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to the ordinary rules of succession, he was made an heir by the act of Maharaja Sidnath Sing, who, he says, appointed a daughter, Jeebnath's mother, to raise a son to him; and he contends that, by a rule of Hindu law, a son of a daughter so appointed is entitled to succeed in preference to more distant male relatives. That a rule of law of this nature is to be found amongst old collections of Hindu law appears to be established by the text to which Mr. Leith referred; but there seems to be an opinion amongst the text-writers that that rule has become obsolete. In Sir Thomas Strange's book (1), under the head of "Inheritance," he thus speaks of it:—"Daughters.—The right of daughters to succeed in default of sons and widow, is not to be confounded with that of the appointed daughter under the old law. That appointment was one of the many substitutions for the son, and by a fiction no longer subsisting regarded as one." Then (2) he says, referring to another custom:—"This is analogous to the law as applicable to the appointed daughter, before that substitution, with others of a more questionable kind, became obsolete." In Sir William Macnaghten's Treatise on Hindu Law (3), in the Chapter on "Adoption," he says:—"In former times it was the practice to affiliate daughters in default of male issue, but the practice is now forbidden. The other forms of adoption enumerated by Manu appear to be wholly obsolete in the present age." This appointment of a daughter may not be strictly an adoption, but the text-writers evidently refer to this custom, amongst others, as being obsolete. It is not necessary in this case to decide that this is so, although there certainly does not appear to have arisen in modern times any instance in the Courts where this custom has been considered. But supposing it to exist, inasmuch as it breaks in upon the general rules of succession, whenever an heir claims to succeed by virtue of that rule, he must bring himself very clearly within it.

(1) Hindu Law, Vol. i, p. 137.

(2) *Id.*, p. 138.

(3) Principles and Precedents of Hindu Law, 1st ed., Vol. i. p. 102.

It is difficult to discover the precise ground on which the plaintiff originally based this claim. The plaint certainly does not state enough to bring him within the rules as laid down in *Menu* and in the *Mitakshara*. The plaint says this :—"Your petitioner's maternal uncle, Maharaja Luchmeenath Sing Bahadur, agreeably to the counsel of his father Maharaja Sidnath Sing Bahadur, having given in marriage your petitioner's mother, kept her under his roof, declaring and giving her hopes that, if a son be born to her, such son will stand in the relation of son's son to his mother's father, and that if at any time occasion arise, he will observe the religious rites of *sradh* (obsequies), and keep the estate intact ; and accordingly your petitioner, from the day of his birth to the present moment lived with the deceased Maharajas in common for all the purposes of board, lodging, and worship." Now, in this statement, it is not said that the Maharaja Sidnath, by any act of his, appointed the daughter, nor that the son, her brother, Luchmeenath Sing, did any formal act appointing her to raise a son to his father; the plaint says no more than that the latter gave her hopes that, if a son was born to her, such son would stand in that relation.

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Looking at the text, it seems not only that the act of appointment must proceed from the father himself, but apparently should be made by himself, because all the forms of expression which are given are those which it is supposed the father himself would utter. In *Menu* the leading passage referred to by Mr. Leith in Chapter ix, s. 127, is :—"He who has no son may appoint his daughter in this manner to raise up a son for him, saying, 'the male child who shall be born from her in wedlock shall be mine for the purpose of performing my obsequies.'" The passages in the *Mitakshara* are to the same effect. In Chapter i, s. 11, cl. 3 :—"The son of an appointed daughter (*patrika-patra*) is equal to him,—that is, equal to the legitimate son. The term signifies son of a daughter. Accordingly, he is equal to the legitimate son, as described by *Vasishtha* :—"This damsel, who has no brother, I will give unto thee decked with ornaments : the son who may be born of her shall be my son." Or that term may signify a daughter become

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ing by special appointment a son." The last is not the present case. As their Lordships understand, what is set up is, not that the daughter became a son by appointment, but that she was appointed as a special daughter from whom might proceed a son who should stand in the place of a son's son. The passage proceeds:—"Still she is only similar to a legitimate son, for she derives more from the mother than from the father. Accordingly, she is mentioned by Vasishtha as a son, but as third in rank." Then the note to that is:—"The patrika-patra is of four descriptions. The first is the daughter appointed to be a son; she is so by stipulation to that effect. The next is her son; he obtains, of course, the name of son of an appointed daughter, without any special compact: this distinction, however, occurs; he is not in place of a son, but in place of a son's son, and is a daughter's son,"—that is, the son of a daughter, who is herself appointed to be in the place of a son. Then there is this:—"The third description of son of an appointed daughter is the child born of a daughter, who was given in marriage, with an express stipulation in this form:—"The child which shall be born of her shall be mine for the purpose of performing my obsequies." The attempt is made to bring the appellant within this third description of son of an appointed daughter. A special form of stipulation is given. It is stated that it must be expressed, and Mennue also speaks of an express appointment proceeding in the same way from the father himself upon the marriage of the daughter. In this case no appointment was made by the father, and it certainly requires positive law, or evidence of a custom from which the law may be presumed, that, supposing the rule still to exist that a father may appoint a daughter for this purpose, it is a part of it that he may delegate the appointment to his sons. There is nothing said of that power to delegate being a part of the law, but, on the contrary, the rules as to the manner of appointment given in the old authorities point to the act proceeding personally from the father. The law as to adoption of sons bears an analogy to this, but the usages of that law cannot, without authority, be imported into this mode of appointment. These adoptions must stand upon the authority relating to each.

In this case, there was no formal appointment by the father himself in his lifetime, and no sufficient authority has been cited to establish that what was done afterwards can have the effect of making the son of the daughter, who appears to have been married with the consent of her brother upon the condition that the husband should live in the house, equal for the purposes of succession to the son of a son. But, however the law may be, the evidence of the authority supposed to have been given by Maharaja Sidnath to his sons, and of the exercise of it by them, is most vague and unsatisfactory. No more appears respecting the supposed exercised of it by the sons, than that when their sister married, a condition was imposed upon the husband that they should live in the Maharaja's (her brother's) house, and the son be brought up as one of his. No ceremonies are proved to have been performed, nor any express form of appointment used. This evidence seems to be wholly insufficient to establish a formal appointment which is to have the serious consequences of altering the line of succession.

On the whole, therefore, their Lordships think that the judgments of the Courts below are correct, and they will humbly advise Her Majesty to affirm them, and to dismiss this appeal with costs.

Appeal dismissed.

Agents for the appellant: Messrs. *Watkins and Lattey*

Agents for the respondents: Messrs. *H. and J. Henderson.*

APPELLATE CIVIL.

Before Sir Richard Couch, Kt., Chief Justice, and Mr. Justice L. S. Jackson.

IN THE MATTER OF THE PETITION OF SYUD ABDŪŌL ALI.*

24 & 25 Vict., c. 104, s. 15—Act X of 1870—High Court—Powers of Superintendence—Act X of 1870, ss. 29 & 39.

The Courts established under Act X of 1870 are Courts subject to the appellate jurisdiction of the High Court, and not the less so, because an appeal lies to the High Court from their decisions in certain cases only. The High Court consequently has the power of superintendence over those Courts under s. 15 of 24 & 25 Vict., c. 104.

* Application for admission of review of an order made in Rule No. 696 of 1874 in the matter of the land Acquisition Act.

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There is nothing in Act X of 1870 which gives the Judge and Assessors sitting to gether power to determine the right to compensation, or the title to the land for which compensation is to be assessed. Where therefore the Collector tendered compensation in respect of land, some of which was above, and some below, high water mark, and made an offer for each separately,—*Held*, that the Judge and Assessors had no power to award the whole sum tendered by the Collector as compensation for the land above high water mark, but they should have determined what was a proper compensation for each description of land.

APPLICATION for review of judgment in an appeal from the decision of Mr. Beamfort, the Judge appointed under Act X of 1870 to hear cases in Calcutta and the 24-Pergunnas, in a case referred by the Collector under ss. 15 and 18 of the Act, he being unable to agree with the parties as to the amount of compensation to be paid.

The facts were stated in the reference, the material portions of which were as follows:—

“The land is part of the foreshore of the eastern bank of the river Hooghly. Its area is 5 bigas 4 katas 14 chittaks and 18 square feet. Its boundaries are:—On the north, the premises of Messrs. Ralli Brothers; on the south, the river bank in the possession of Syud Abdool Ali; on the east, the remaining portion of the bank of the Hooghly; and on the west, the river Hooghly. There have been no damages under s. 5 or 17. I have tendered as compensation under s. 11 Rs. 6,355-15. I have determined my tender on the following grounds:—The land above high water measures 11 katas 1 chittak and 29 square feet. I have tendered for this at the rate of Rs. 150 a kata, being a higher rate than any plain land in the neighbourhood has fetched when sold, as far as I can ascertain. The amount of my tender for the land above high water mark is Rs. 1,665-10. The land below high water mark measures 4 bigas 13 katas 12 chittaks and 34 square feet. I have offered for this at the rate of Rs. 50 per kata, or Rs. 4,690-5. Thus, the total amount offered by me is Rs. 6,355-15. I do not admit the right of any one save the public to the land below high water mark. But I understand that a claim is likely to be put forward by some of the persons whose names are noted above to a private interest in this tidal land, and it is necessary that this claim should be settled.”

The case was heard by Mr. Beaufort and two Assessors. The parties other than the Collector not being able to agree in regard to the nomination of an Assessor, the Court appointed, on the part of all the owners, Baboo Denonath Bose, who was proposed by Syud Abdool Ali. Mr. Rowe was appointed Assessor on the nomination of the Collector.

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Baboo Denonath Bose, observing that Messrs. Ralli Brothers paid about Rs. 5,000 per biga in addition to the annual rental, and that if the zemindar's right had been included in the purchase, they would have paid a larger price, awarded Rs. 5,800 per biga, or Rs. 290 per kata; and as there was no evidence to show what portion of the area taken was below high water mark, he awarded at that rate for the whole land. The amount which he awarded for the whole land was Rs. 30,421.

Mr. Rowe was of opinion that the price paid by Messrs. Ralli Brothers for land which was above high water mark, and on which buildings had been erected, could not be the criterion of the market-value of the present land, which was under water; and that as he had ascertained that the greater portion of the land was below high water mark, no compensation ought to be paid for such land. On these grounds he thought that the Collector's tender was very liberal and awarded that amount.

The Judge in his award said:—"The calculation of Baboo Denonath Bose is erroneous, for he has included in the Rs. 5,000 the amount paid by Messrs. Ralli Brothers to the occupants of the land as a bonus for removing from it. He is also wrong in not distinguishing between the lands above and below high water mark, because, the Collector has given the areas of both distinctly in his public letter of reference, and they are also clearly shown in the map, and as none of the parties has disputed the correctness of the measurement or statement, silently accepting it, it must be assumed to be correct. Mr. Rowe has rightly observed that the claimants are not entitled to any compensation for the land below high water mark, because they have not shown that they have any right in it. I concur also with him in thinking that the amount tendered for the small margin

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of land above high water mark is ample. I cannot ascertain what compensation is due for the deprivation of the river frontage, because no evidence referring to it is before me."

On application to the High Court, a rule was issued by Jackson and McDonell, JJ., calling on the Collector to show cause why the award should not be quashed and a new investigation directed.

The rule was heard before Couch, C.J., and Jackson J., and the following judgments were delivered on 15th December 1874 :—

COUCH, C.J. (after reading the opinions of the Assessors, continued) :—The fair construction of this is that Mr. Rowe, being of opinion that the claimants were not entitled to any compensation for the land below high water mark, decides that the sum offered by the Collector for the land above both high and low water is a liberal compensation, and awards it not for what it was tendered for by the Collector, but for the land above high water mark. Taking the entire sum offered for both descriptions of land, he appropriates it to the land which he considered the claimants were entitled to have compensation for. (The learned Judge then read the portion of Mr. Beaufort's award set out and proceeded) :—Thus Mr. Beaufort adopts the opinion of Mr. Rowe, for he not only says that Mr. Rowe has rightly observed that the claimants were not entitled to compensation for the land below high water mark, but he says :—" I concur also with him in thinking that the amount tendered for the small margin of land above high water mark is ample." The expression " I concur also" shows that he intended to concur with Mr. Rowe in what was previously stated, viz., that the parties were not entitled to compensation for the land below high water. If he meant anything else he would differ from Mr. Rowe; so that, in effect, both Mr. Beaufort and Mr. Rowe have applied as compensation for one description of land what the Collector had tendered as compensation for both descriptions.

In a passage which follows, there is a little inconsistency, perhaps only apparent, between what Mr. Beaufort had said before and what he then says, for in speaking of apportioning

the money, he says:—"Now, neither of these parties has adduced any evidence to show that any portion of the land in question is covered by either of these leases to which they refer, and it is I think highly improbable that either the maurasidar or the dar-maurasidars contracted to pay rent for the land below high water mark," as if in apportioning the compensation he was looking upon it as including the land below high water mark. Notwithstanding this it appears to me to be clear that Mr. Beaufort adopted the same mode of awarding compensation as the Assessor Mr. Rowe had.

Then what has in fact been done is that, although Mr. Verner had made an offer of compensation for the land below high water mark of Rs. 50 a kata, at the same time saying that he did not admit the right of the claimant to the compensation, Mr. Beaufort and Mr. Rowe have decided that the claimants are not entitled to any compensation for it, and have determined the question of their right to this land. Now s. 21 of the Land Acquisition Act states that, "as soon as the Assessors have been appointed, the Judge and the Assessors shall proceed to determine the amount of the compensation;" and in s. 24, it is said that, in determining the amount of compensation to be awarded for land acquired under this Act, the Judge and the Assessors shall take into consideration first the market-value of the land; secondly, the damage sustained by reason of severing such land from other land of the person interested; thirdly, the damage sustained by reason of the acquisition injuriously affecting his other property in any other manner, or his earnings; and fourthly, if in consequence of the acquisition he is compelled to change his residence, the reasonable expenses incidental to such change. But there are no words in this Act which give to the Judge and Assessors sitting together, as they did, the power of determining the right to compensation, or the title to the land for which the compensation is to be assessed.

In s. 15 there is a provision for any question respecting the title to the land, or any rights thereto, or interest therein, by persons making conflicting claims, being referred by the Collector to the determination of the Court; but there is no express provision in the Act for the decision of such questions.

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opinion, to which our attention has now been called, it does not appear to me that the words which were omitted by Mr. Beaufort make any real difference in the fair meaning of Mr. Rowe's language. If the language were ambiguous and might fairly bear the construction, which the learned Advocate-General contends for, as well as that which I think is the right one, still it appears to me that in a case of this description it ought to be quite clear and free from ambiguity that the compensation has been awarded for the land below high water mark. The Collector very properly made his offer for the land above, and the land below high water mark, separately, and it was necessary that it should be separately assessed in such a manner that the parties might know what the Judge and the Assessors intended. I see no reason for altering the opinion which I formed when our attention was only called to the statement of Mr. Rowe's opinion by Mr. Beaufort, now that we have had the full note of that opinion read to us by the Advocate-General.

Another question which has been raised by the learned Advocate-General is as to the jurisdiction of this Court. The 15th section of the Act for establishing this Court gives to it a superintendence over all Courts which may be subject to its appellate jurisdiction. This section goes on to give to the Court "power to call for returns, and to direct the transfer of any suit or appeal from any such Court to any other Court of equal or superior jurisdiction, and to make and issue general rules for regulating the practice and proceedings of such Court, and also to prescribe forms for every proceeding in the said Courts." I think these words cannot be taken as restricting the previous words which give superintendence over all Courts subject to the appellate jurisdiction of this Court, and as limiting the exercise of that power to Courts for which it may be desirable that this Court should issue general rules for regulating their practice and proceedings, and should prescribe forms. But I am not prepared to say, if the question arose, that this Court might not exercise the power of regulating the proceedings of these Compensation Courts as I may call them. It is not necessary for us now to decide that.

Then the question is, can this Court constituted under Act X

of 1870 be said to be a Court which is subject to the appellate jurisdiction of the High Court.

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The 35th section of the Act says, that, "if the Judge differs from both the Assessors as to the amount of compensation, he shall pronounce his decision, and the Collector may appeal therefrom to the Court of the District Judge unless the Judge whose decision is appealed from is the District Judge, or unless the amount which the Judge proposes to award exceeds Rs. 5,000, in either of which cases the appeal shall lie to the High Court." To say that the Compensation Court (I use that term as describing it generally) does not come within the meaning of s. 15 of the High Court's Act, because the appeal only lies to this Court in certain cases where the amount of the compensation proposed to be awarded exceeds Rs. 5,000, or where the decision appealed from is that of the District Judge, would I think be an unreasonable construction of the section. It is not the less the Appellate Court because in certain cases only an appeal lies to it. There are instances, where, in suits of a certain description, an appeal does not lie from the original Court to this Court whilst in others it does, and this Court is still the Appellate Court within the meaning of s. 15, and has power to superintend the proceedings of the original Court.

The other point raised by the learned Advocate-General as I understood him (I am not sure that I understood him correctly) is that the awarding compensation is not a proceeding of the Court, but a proceeding of the Judge and the Assessors, and that there is a distinction between the Court and the Judge and Assessors. I think an examination of the sections shows that there is no force in this objection. S. 18, the first in Part iii of the Act, which part is headed "Reference to Court and procedure thereon," speaks of what is to be done by the Collector in making the reference. After the reference is made to the Court, a notice is to be served on the persons named in it requiring them to state to the Court the sums claimed as compensation, and a notice is to be served on the Collector. Then it proceeds to state how the Court is to be constituted for the purpose of assessing the compensation, namely, two

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Assessors are to be added to the Judge. And the Judge and the two Assessors constitute the Court for the purpose of determining the amount of the compensation. The 24th section says how they are to do it, the Judge and the Assessors being then the constituted Court for the purpose. And so the Act proceeds; s. 32 saying that the costs of all proceedings taken under the Act by order of the Court shall in the first instance be paid by the Collector, and s. 34 providing for how the award shall be signed, namely by both the Judge and the Assessors. Then Part iv shows how another duty is to be performed, namely, the apportionment of the compensation. When the proportions are to be determined, the Court is to be the Judge sitting alone.

The sections in Part iii appear to me to show that the Court which performs the duties required by those sections to be performed is the Judge and the Assessors. It comes within the meaning of s. 15 of the High Court's Act, that is, it is a Court which is subject to the appellate jurisdiction of the High Court in certain cases; I therefore think no ground has been shown for reviewing our decision.

JACKSON, J.—I am of the same opinion upon all the points raised to-day. As to the opinion of Mr. Rowe, the course taken by the learned Advocate-General might possibly seem to suggest (and I say this because this matter came before me in its first stage and not before the Chief Justice) that the opinion had not when the rule was applied for, been submitted to the Court *in extenso*. It is right to say that that opinion was in its exact words annexed to the petition of Abdool Ali, and was I am sure considered by myself and my colleague McDonell, J., in granting the rule. If in delivering judgment in this matter the learned Chief Justice referred to the statement of Mr. Rowe's opinion contained in the judgment of Mr. Beaufort, it no doubt was because the gentlemen who appeared before us and argued the matter were not conscious of any real difference between the opinion as stated in the judgment and as expressed in Mr. Rowe's own words. That which Mr. Beaufort states as the effect of Mr. Rowe's opinion is a paraphrase of it rather than

a quotation of any portion of it, and it probably was caused by the understanding which Mr. Beaufort arrived at of Mr. Rowe's opinion after discussing the matter with him. I think it is almost too clear for discussion that Mr. Rowe, not considering the claimant entitled to any compensation in respect of the land below high water mark, and for that reason not deeming it necessary to estimate the exact value of the land above high water mark, and being aware that the Court would be bound to award a sum not less than what the Collector had offered, expressed it as his opinion that the offer made by the Collector, taken as a whole, was a liberal one.

Then as to the question of jurisdiction, I have no doubt at all. I think in the first place that where any Court is constituted by the Legislature here in respect of which the High Court is the Appellate Court, whether the right of appeal be general, or whether it be restricted, the jurisdiction given by s. 15 of the High Court's Act applies, and if we were now to begin limiting that jurisdiction by reference to the fact that appeals in certain cases are withdrawn, we should probably find that the superintending jurisdiction of this Court would have to be given up altogether, because there is scarcely a single Court in respect of which an appeal is not in some instance or other taken away by some provision of law.

But in addition to that it must be borne in mind that these Courts constituted under Act X 1870 are no other than one or other of the regular Civil Courts of the country, all of which, with the exception of Small Cause Courts, arrive at their decisions subject to appeal to the High Court.

The third Part of the Land Acquisition Act contains the sections relating to a reference to the Court and the procedure thereon, and one of these sections confers upon the Court constituted as the Act requires the power of giving a decision in the case which shall be final under certain circumstances, namely, where the Judge and one or both of the Assessors shall agree as to the amount of the compensation. That therefore limits the appeal; but where the Judge differs from both the Assessors as to the amount of compensation an appeal lies from his decision. In that case therefore the decision of the Court is subject to the

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appellate jurisdiction of the High Court. It seems to me therefore that the superintending jurisdiction arises; and I am bound to say, from the experience we have of awards made in these cases, that it would be a matter of regret, if this Court had not or were disabled from exercising that jurisdiction. We have seen enough to show how necessary it is that the procedure of the Courts acting under Act X of 1870 should be submitted to something more than the ordinary appeal given by the Act.

As to the third point, I confess I was somewhat surprised to find that the learned Advocate-General raised it, for nothing can be clearer than that the word "Court" whether it is used in the Act means the Court made up in certain cases of the Judge and the Assessors; and s. 39, upon which so much stress was laid, merely refers to the cases where the amount of the compensation had to be settled by the Court constituted under the Act, as distinguished from those cases referred to in s. 38 where the amount of compensation has been settled under s. 14 by the Collector; and the compensation settled by the Court is no doubt the compensation set out in the award described in s. 34.

Rule discharged.

PRIVY COUNCIL.

RAM TUBHUL SINGH (ONE OF THE DEFENDANTS) v. BISESWAR LAL SAHOO AND ANOTHER (PLAINTIFFS).

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Feb. 16, 19; [On Appeal from the High Court of Judicature at Fort William in Bengal.]
&
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Purchase in execution of surplus proceeds of Revenue Sale—Setting aside Revenue Sale—Suit to recover Purchase-Money—Voluntary Payment.

See also
B. L. R.
1 Cal 55.

A person, who with notice, buys property subject to a contingency, which may defeat or destroy the interests which is the subject of sale, is not entitled to be relieved from his bargain and to recover the purchase-money, merely because the contingency contemplated actually happens, and the property either does not become, or ceases to be, available for his benefit.

* *Present*;—SIR J. W. COLVILLE, SIR M. E. SMITH, AND SIR R. P. COLLIER.

An estate of which *B* was one of the registered shareholders was sold for arrears of revenue, and the amount realized, after deducting the arrears and the expenses of the sale, remained in deposit with the Collector. *S* the holder of a decree against *B*, notwithstanding objections made by *B*, caused the interest of *B* in the surplus proceeds in the hands of the Collector to be attached and sold in execution of his decree. At the execution-sale *R*'s interest was bought by *B*, and from the money paid by him the judgment-debt of *S*, and the debts of other judgment-creditors of *B*, were satisfied. In the mean while *R* brought a suit to set aside the revenue sale of the estate, and obtained a decree in his favor in the High Court. *B* then applied to the Collector for *B*'s share of the surplus proceeds, but his application was refused. In a suit by *B* against *R* to recover the price he had paid at the execution-sale :

Held, reversing the judgment of the High Court, that such a suit could not be maintained.

APPEAL from a decree of the High Court at Calcutta (Couch, C.J., and Phear and Ainslie, JJ.), dated the 21st of March 1873 reversing the decree of the Subordinate Judge of Zilla Tirhoot, dated the 27th May 1872.

The facts of the case were briefly as follows :—An estate in which the appellant was a shareholder having been sold for arrears of Government revenue, the appellant's share of the surplus proceeds of sale were attached and sold by an execution-creditor of the appellant to the plaintiffs for Rs. 8,000, and the attaching and certain other execution-creditors of the appellant applied this Rs. 8,000 in satisfaction of their decrees. Before the sale to the plaintiff was confirmed, the appellant had instituted a suit to have the sale for arrears of revenue set aside. In that suit he was successful, and the Collector accordingly refused to pay the surplus proceeds of the appellant's share to the plaintiffs, who thereupon brought the present suit against the appellant and his abovementioned execution-creditors to recover the Rs. 8,000. The first Court dismissed the suit, but the High Court on appeal decreed the recovery of the amount claimed from the appellant, dismissing the suit as against the other defendants, but without costs as regarded the representative of the attaching creditor (1). The appellant then preferred the present appeal to Her Majesty in Council.

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Mr. *Leith*, Q. C., and Mr. *Macnaghten* for the appellant.

The respondents were not represented.

Mr. *Leith*.—The High Court was wrong in holding that the respondents, the plaintiffs in the lower Courts, were entitled to a refund. The sum which they seek to recover was not paid at the request of Ram Tuhul, nor to his use. The case of *Sowdamini Chowdrain v. Krishna Kishor Poddar* (1), which was decided by a Full Bench, is expressly opposed to the ruling in the present case. It was there held that a purchaser at a sale in execution could not claim to recover his purchase-money under s. 258, Act VIII of 1859, unless the sale has been set aside under s. 257 for irregularity. The High Court has pretended to distinguish between the two cases on the ground that in the Full Bench case there was an eviction by a third party, while here it was the proceedings of the judgment-debtor himself which rendered the subject of the sale not available for the auction-purchasers. The principle, however, in both cases was the same. The auction-purchasers had notice that the interest which they bought was a contingent interest, and that the judgment-debtor was about to institute proceedings, the effect of which might be to defeat that interest. They bought with a knowledge of this risk, and must take the consequences. The cases of *Bellamy v. Sabine* (2) and *Belcher v. Vardon* (3), cited by the High Court, had no bearing on this case. They were illustrations of the maxim that he who comes for equity must do equity. That maxim applies in the case of a party making a claim, but does not apply in the case of a defendant against whom a claim is made.

Mr. *Macnaghten* on the same side.—The respondent's case is bad both at law and in equity. If a man voluntarily pays a debt, he cannot sue the person whose debt he has paid at law for repayment. If the plaintiff voluntarily placed his money to an account where it became available for payment of another person's debts, and where that other person's creditors were

(1) 4 B. L. R., F. B., 11.

(2) 2 Phil., 425.

(3) 2 Collyer, 162.

enabled to come in and carry it away, he cannot sue that person to recover it back. He has no further right to the money. There is no ground for saying that the payment was other than voluntary. It was open to the plaintiff to buy or not as he thought proper. There are three questions raised :

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First.—What was the subject of the execution-sale which took place on the 18th February 1868 ? Second.—Was the appellant under any obligation to affirm the sale, or to abstain from acts which might have the effect of defeating it ? Third.—Assuming the sale to have been irregular, does that affect its validity, and is the plaintiff in a position to take advantage of the irregularity and recover his money ?

In dealing with the first two questions the regularity of the sale is assumed ; in respect of the third it is assumed that the sale was irregular.

In reply to the first question,—what was the thing put up for sale ?—we refer to the terms of s. 249, Act VIII of 1859, under which all that can be sold is the right, title and interest of the judgment debtor. The proclamation of the sale is to declare this, and the certificate of the sale is in corresponding terms. There can therefore be no doubt as to what was sold, namely, the appellant's interest in the surplus proceeds of the revenue sale. But that was a contingent interest. The time for moving to set aside the revenue sale had not expired, and the appellant had given notice that it was his intention to move. The plaintiff, consequently, knew that the interest was contingent, and that he bought at a risk. The price paid, *viz.*, Rs. 8,000 for what was estimated at Rs. 35,000, shows the risk. The appellant objected to the execution-sale but the Court held him to it. Had the revenue sale been confirmed, the plaintiff would have been a gainer to the extent of the difference between Rs. 8,000 and Rs. 35,000, and the appellant would have been a loser to that amount. It was only when he saw that the revenue sale had been set aside, and that he was likely to lose by his bargain that the plaintiff showed any wish to abandon it, and to recover his purchase-money. That appears from the dates of the various proceedings. That the plaintiff's bargain had turned out a losing one, gives him no right to a refund. He cannot

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appeal to equity in such a matter. "*Caveat emptor* is a very needless advice if the Chancery can establish another rule instead of it by declaring that equity must suffer no man to have an ill bargain. . . . The Chancery mends no man's bargain;" *per* Lord Chancellor Finch, in *Maynard v. Moseley* (1).

As to the second question,—was the appellant under any obligation to affirm the sale or to refrain from taking steps to defeat it?—it is submitted he was under no such obligation. He was under no contract to guarantee the interest sold to be a substantial interest. The payment of his debt, that not having been done at his request, express or implied, laid no obligation on him.

As to the third question. The sale is alleged to have been irregular as contrary to the provisions of s. 242, Act VIII of 1859. Assuming its irregularity, the plaintiff cannot now object to its validity. The sale became absolutely binding on the 28th August 1868, when the certificate was granted. The plaintiff's suit was not brought till the 4th January 1872, more than three years after.

Our. adv. vult.

The judgment of their Lordships was delivered by

SIR J. W. COLVILLE.—The point raised by this appeal is one of novelty, and of some nicety. The facts out of which it arises are undisputed.

The appellant is one of the registered shareholders of a certain estate which, on the 16th of February 1867, was sold for arrears of Government revenue, under the last Sale Law, Act XI of 1859. The sale was confirmed by the Revenue Commissioners on the 14th of the following June; and after deducting the arrears of Government revenue and sale expenses the sum of Rs. 1,39,692-2-5 remained as surplus proceeds in deposit in the hands of the Collector. The share of the appellant in such surplus proceeds, if the sale had stood, would have been upwards of Rs. 35,500. On the 24th of February 1868,

(1) 3 Swanston, pp. 653, 655.

however, the appellant, suing in *forma pauperis*, instituted a suit for the purpose of setting aside the revenue sale, on the ground of the non-observance of one of the formalities prescribed by the Act. The suit was dismissed by the Subordinate Judge; but, on appeal, the High Court, by an order dated the 3rd of May 1870, reversed his judgment, and remanded the cause for the trial of an issue which he had left untried; and on its coming back to them with the finding on that issue, made a final decree in the appellant's favor, on the 31st of January 1871. Against that decree there was an appeal to Her Majesty in Council, which was dismissed, in conformity with the judgment delivered at this Board on the 18th of December 1873 (1). The sale, therefore, has been conclusively set aside; the estate restored to the appellant and his co-sharers; and the purchase-money returned to the purchaser.

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Before this, however, and on the 25th of November 1867, one Shee Pershad Sookul, a judgment-creditor of the appellant, attached his interest in these surpluss proceeds in the Collector's hands, and on the 23rd of December 1867 obtained an order for the sale of that interest in execution. The sale was originally fixed for the 3rd of February following, but, on the appellant's application, was postponed for a fortnight, and took place on the 18th of February 1868, when the appellant's interest in the surplus proceeds was knocked down for Rs. 8,000 to one Juldhari Panday, who afterwards declared that he bought as agent for and on account of the respondents. On the 16th of March 1868, the appellant filed a petition for the reversal of this sale on two grounds: 1st, that the surplus proceeds had not been ascertained to belong to the petitioner, inasmuch as he had instituted a suit to set aside the revenue sale, which was then pending; and secondly, that the sale had been held in contravention of the 242nd section of the Code of Procedure, which prescribes a different mode of enforcing an execution against money in the hands of a third party, and, consequently, that the sale was irregular. The Principal Sudder Ameen, in whose Court these execution-proceedings were

(1) *Bunowari Lall Sahu v. Mohabir Persad Singh*, See 12 B. L. R., 297.

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pending, by two orders, dated the 18th of April 1868, disallowed these objections, and confirmed the sale; the formal certificate was, however, not delivered to the respondents until the 28th of August 1868. Of the Rs. 8,000 which had been paid into Court upon the sale, about Rs. 5,318 were drawn out by Sheo Pershad Sookul, and applied in satisfaction of the decrees held by him; and the residue was drawn out by other judgment-creditors of the appellant, and similarly applied by them.

On the 14th of August 1871, the respondents petitioned the Collector for payment to them, as purchasers under the execution-sale, of the whole of the appellant's assumed share in the surplus proceeds of the revenue sale, being upwards of Rs. 35,500. The High Court had then made its final decree setting aside the sale; and the Collector therefore refused to part with the fund. Upon that, and on the 4th of August 1872, the respondents instituted the present suit for the recovery of Rs. 11,714-10-8, being the Rs. 8,000 with interest, calculated from the date of the payment into Court. It was brought against the appellant, against the heir of Sheo Pershad Sookul, and against the other judgment-creditors of the appellant who had shared in the Rs. 8,000; and the cause of action is thus stated in the plaint:—"As the rights of the judgment-debtor with respect to the surplus sale proceeds of the said mehal did exist up to the time of the execution-sale held in the case of Sheo Pershad Sookul; and as, by reason of the revenue sale having already been confirmed, there was no reasonable ground of apprehension with respect to such surplus proceeds; and as the Collector now objects to make over the surplus proceeds on the ground of the revenue sale being set aside; for these reasons, and, moreover, in consideration of the fact, that the debts due by the judgment-debtor have been satisfied out of the consideration-money paid by your petitioners, and that the judgment-debtor cannot be permitted to derive two-fold advantages, since he has been benefited by the reversal of the sale of the land, and he has not deposited in Court the amount of the purchase-money paid by your petitioners. the plaintiffs are, under such circumstances, entitled by all means to recover the said purchase-

money with interest. The cause of action has accrued from the 25th of August 1871" (the date of the Collector's refusal to pay).

It does not appear very clearly with what object the respondents sued the execution-creditors, whether or not in order to establish an alternative case for relief against them, in case the suit should fail against the appellant. The issues settled however seem to imply that the claim was for recovery of the money against one or other of the defendants.

The Court of first instance dismissed the suit against all the defendants with costs, holding that the plaintiffs had established no title to a refund of the purchase-money paid. But the High Court, on appeal, reversed this decision, and made a decree for the recovery of the amount claimed from the appellant; dismissing the suit as against the other defendants, but without costs as regarded the representative of Sheo Pershad Sookul.

The appeal is against the last decree, and the single question is, whether the plaintiffs (the respondents) have shown that they have any cause of action for the recovery of this money against the appellant.

The appeal has, to their Lordships' great regret, been heard *ex parte*. This circumstance has rendered them the more anxious to give full weight to every reason assigned by the learned Judges of the High Court in support of their decree, and to every consideration that can be suggested in favor of the absent respondents. But they have, nevertheless, come to the conclusion that the respondents have established no title to recover the sum sued for from the appellant, and that the appeal ought to be allowed.

The learned Chief Justice of Bengal, in the judgment delivered by him, with the concurrence of the two other Judges who sat with him, says:—"I think the rule that ought to be applied in this case, is that which is applied by Courts of Equity where sales are set aside on account of fraud, or for other reasons which are held by the Court to vitiate the sale." And he then cites and relies upon a passage in Lord Cottenham's judgment in *Bellamy v. Sabine* (1), which he treats as estab-

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lishing the broad proposition that where a transaction ought never to have taken place, the rights of the parties are, as far as possible, to be placed, in the situation in which they would have stood if there had never been any such transaction. This observation of Lord Cottenham's was, however, made with reference to a particular objection taken to the granting equitable relief in that somewhat complicated case. The bill in *Bellamy v. Sabine* (1) impeached two transactions: one by which a needy father, tenant for life, and a needy son, tenant in tail, had, at the instigation of Sabine, a creditor of the father, come to a certain arrangement which involved the barring of the entail; the other, a transaction by which the son had sold and conveyed his remainder in fee, thus acquired, to Sabine. The son died in his father's lifetime, and the suit was brought by another son, who was next in remainder under the entail. Lord Cottenham held that the plaintiff was entitled to sue either in that character, or as heir-at-law of his brother; that the transaction between the father and the elder brother could not be successfully impeached; but that the purchase from the latter by Sabine was fraudulent, and ought to be set aside. And then proceeding to deal with the objection which had been taken, that the personal representative of the elder brother had an interest in supporting that purchase, part of the purchase-money being still unpaid, and that it was contrary to the course of the Court to deal with the conflicting rights of the real and personal representatives, he made the observation relied upon. In fact, he ruled only that an interest derived under the conveyance impeached could not affect the equitable right of the heir-at-law to have that conveyance set aside for fraud. If this principle has any application to the present case, it seems to be against rather than in favor of the respondents. The conveyance was set aside on the terms ordinarily imposed, viz., the payment by the plaintiff to Sabine of the sums actually paid by him.

In their Lordships' opinion, however, the case of *Bellamy v. Sabine* (1), and the other cases in equity, which are cited in the judgment under appeal, are inapplicable to the present, upon

(1) 2 Phil., 425, see 442.

the broad ground that they all proceed upon the doctrine of Courts of Equity that a plaintiff who comes to be relieved from his own act, or the act of one whom he represents, on equitable grounds, must do equity, and submit to those equitable conditions which the Court may see fit to impose on its grant of relief. Here the appellant is not seeking the aid of the Court, but is sued as a defendant, and the money sought to be recovered has not been paid under any contract of his, or in any transaction to which he was a consenting party, but under proceedings taken *in invitum*.

Again their Lordships must observe that a fallacy, occasioned by some confusion in the use of the words "transaction" and "sale," seems to run through the judgment. What is the transaction or sale which has been set aside? It is not the execution-sale under which the Rs. 8,000 were paid, but the statutory revenue sale. A good deal, no doubt, has been said in the judgment of the Court of first instance, and something has been said here at the Bar, of the irregularity of the execution-sale, and of the miscarriage of the Principal Sudder Ameen in putting up the appellant's possible interest in the surplus proceeds for sale, instead of proceeding under the 242nd Section of the Code of Procedure. And their Lordships think it is much to be regretted that that officer did not proceed under the wholesome provision which was designed in such cases to remedy a mischief of frequent occurrence in India—the ruinous sacrifice of property which an execution-sale is apt to involve. But they must observe that since the objections of the appellant were overruled, no attempt has been made to question the regularity or legal effect of that sale; that the respondents held to it as long as there was a hope of their getting anything by it; that their present suit is not framed with the object of setting it aside, or of being relieved from it; and consequently that any judgment declaring its invalidity, or treating it as a nullity, would be extra-judicial.

The learned Chief Justice no doubt seeks to meet the objection just taken by saying that the appellant ought to have made the respondents parties to the suit for setting aside the revenue sale, and holds that the Court ought to give them in

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this suit the relief which he assumes they would, if they had been made parties to it, have obtained in the other suit, by way of condition on the relief then granted. Their Lordships, however, fail to see that there was any obligation on the appellant to make the respondents parties to that suit, and have some doubt whether this question could have been litigated in a suit, the only object of which was to determine whether a statutory sale was to stand good or was to be set aside upon the terms prescribed by the statute. And in any case it would seem that the respondents, if they conceived that they had an interest entitling them to defend that suit, of which they had full notice, might have applied to be made parties to it under the 73rd section of the Code of Procedure.

Upon the whole, then, their Lordships are of opinion that the course and practice of the Court of Chancery in setting aside transactions on account of fraud, or other recognized grounds for equitable relief, affords no support to the decree under appeal.

Upon what ground, then, can the respondents be said to have a substantive cause of action for the recovery of this money from the appellant?

What was the real nature of their purchase at the execution-sale? What did they buy? They bought the appellant's interest in the surplus proceeds, subject to the contingency of his succeeding in his suit to set aside the revenue sale, in which event that interest would become *nil*. They did this with their eyes open, since, at least before the sale was confirmed, they had notice that his suit had been commenced. There was no warranty or contract on his part. The sale was had under proceedings *in invitum*, and indeed against his express protest. The parties were at arm's length. The appellant was free to prosecute his suit; the respondents free to enforce their rights, should he fail, to the uttermost farthing. What they bought, then, was the chance of getting Rs. 35,500 for Rs. 8,000, dependant on the happening or non-happening of a certain event. And a substantial chance it must be taken to have been, since the construction of the clause in the Sale Law, on which the right to annul the sale depended, was

doubtful, and the Court of first instance determined the question against the appellant. If that judgment had stood, he would have lost his land; and the respondents would have taken from him all its proceeds, except the Rs. 8,000 applied in satisfaction of his debts. It is difficult to see upon what general equity existing between parties thus situated the appellant ought to be compelled to restore the respondents to their original position, because the event on which they speculated has ultimately gone against them.

Then it is said that if the respondents fail in the present suit, the appellant will not only keep the estate which he has recovered, but will get debts to the amount of Rs. 8,000 for which his property was liable to be attached and sold, paid with the plaintiff's money.

But even if this were true, it is not in every case in which a man has benefited by the money of another, that an obligation to repay that money arises. The question is not to be determined by nice considerations of what may be fair or proper according to the highest morality. To support such a suit there must be an obligation, express or implied, to repay. It is well settled that there is no such obligation in the case of a voluntary payment by A of B's debt. Still less will the action lie when the money has been paid as here, against the will of the party for whose use it is supposed to have been paid—*Stokes v. Lewis* (1). Nor can the case of A be better because he made the payment not *ex mero motu*, but in the course of a transaction which, in one event, would have turned out highly profitable to himself, and extremely detrimental to the person whose debts the money went to pay.

Their Lordships can find no ground on which the legal liability of the appellant can satisfactorily be rested. The case seems to them to fall within the principle of *Sowdmini Chowdrain v. Krishna Kishor Poddar* (2). The fact that in this case the worthlessness of the subject purchased was a consequence of the success of the judgment-debtor in his own suit, and not of a recovery by a third party under a superior title, does not appear to them in the circumstances

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(1) 1 T. R., 20.

(2) 4 B. L. R., F. B., 11.

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of this case to afford a distinction which ought to prevent the application of that principle.

Their Lordships, for obvious reasons, express no opinion whether the respondents could have had any remedy against the execution-creditors by a suit for setting aside the execution-sale or otherwise; whether in such a case the right of the judgment-creditors would not have been revived against the appellant; or whether, if such a remedy ever existed, the plaintiffs have lost it by the dismissal of this suit against those creditors. These and other questions were suggested in the course of the argument, but in determining this appeal it is unnecessary, and, indeed, would be improper to decide them.

Their Lordships will humbly advise Her Majesty to allow this appeal, and to direct that the decree of the High Court be varied by omitting so much thereof as orders and decrees "that the plaintiffs do recover from the first defendant the sum of Rs. 11,714-10-8, the principal and interest of money which they had paid upon a sale to them of the rights and interests of Ram Tuhul Singh in the surplus sale proceeds of a Talook Muleck Aypore Buzoorg, which had been sold for arrears of Government revenue, and purchased by the plaintiffs on the 18th of February 1868;" and as orders and decrees "that Ram Tuhul Singh defendant, respondent, do pay to the plaintiffs, appellants, this sum of Rs. 470-10-2;" and as orders and decrees "that the said first defendant do pay to the plaintiffs the costs incurred by them in the lower Court;" and by ordering and decreeing in lieu thereof that the suit of the plaintiffs do stand dismissed as against the defendant, Ram Tuhul Singh, and that the plaintiffs do pay the costs incurred by the said defendant both in the lower and in the High Court.

Their Lordships are disposed to recommend an order in the above form, because they do not wish to interfere with the discretion exercised by the High Court in refusing to give his costs of the suit to the defendant Byjnath Sookul. The appellant must also have the costs of this appeal.

Appeal allowed.

Agents for the appellant: Messrs. Lawford and Water house.

**GAJADHUR PERSHAD (PLAINTIFF) v. THE WIDOWS OF EMAM
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March 18.

[On Appeal from the Court of the Judicial Commissioner of Oudh.]

*Practice—Appeal to Privy Council—Leave to Appeal granted without Authority
—Preliminary Objection—Special Leave to Appeal.*

An objection that an appeal has come before the Judicial Committee without proper authority ought to be taken at the earliest moment, but may be entertained at any stage of the appeal, and is not unfrequently heard when the appeal is called on and before the arguments on the merits have commenced.

An appeal being called on, and before the case was gone into on the merits, the objection was taken by the respondent and appeared to be well founded. The appellant thereupon applied to the Judicial Committee to grant him special leave to appeal, *nunc pro tunc*. Held, that it was competent to the Judicial Committee to grant such special leave, but leave was refused under the particular circumstances of the case.

APPEAL from a decision of the Judicial Commissioner of Oudh, dated the 28th June 1870, reversing a decision, dated the 6th June 1870, of the Commissioner of Lucknow, and restoring that of the Deputy Commissioner of Lucknow, dated the 14th April 1870.

The original parties to the proceedings in which the above orders were passed, were Gajadhur Pershad, the present appellant, and Emam Ali Beg since deceased, who was represented in this appeal by his two widows and by his brothers Agha Ali Beg and Panah Ali Beg.

The other respondent was the Raja of Bhinga, who became a party to the litigation by having purchased, during its pendency, the interest of Emam Ali Beg in the property, which was the subject of dispute.

The facts of the case, which are somewhat intricate, are stated in their Lordships' judgment.

On the case being called on for hearing, Mr. Doyne for the respondent, the Raja of Bhinga, took the preliminary objection

* *Present:* SIR J. W. COLVILLE, SIR B. PEACOCK, SIR M. E. SMITH, and
SIR R. P. COLLIER.

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that the case had come before the Judicial Committee without proper authority. The judgment from which the appeal preferred was delivered on the 28th June 1870, and from that judgment the appellant has never at any time presented any petition for leave to appeal to Her Majesty in Council. The order granting him leave to appeal was made on an application for a review of that judgment, presented on the 2nd July 1871, and rejected on the 21st September 1871. When rejecting that application, the Judicial Commissioner had no authority to grant a certificate permitting an appeal to Her Majesty in Council.

Under the order in Council of the 10th April 1868, no such appeal shall be allowed unless the petition for that purpose be presented within six months from the date of the judgment complained of. Act II of 1863, regulating the admission of appeals to Her Majesty in Council from Courts in the Non-Regulation Provinces of India, did not and could not alter the period for admitting such appeals. This objection is in time although taken at the hearing if made before the appeal is entered on—*Ram Sabuk Bose v. Kamines Koomares Dosses* (1). [SIR B. PEACOCK.—The appellant has the leave of the Indian Court.] That is not enough when the leave was give *ultra vires*. [SIR B. PEACOCK.—You put the appellant now to apply to Her Majesty in Council for special leave to prosecute his appeal.] We say that this is not a case in which such leave should be given.

Mr. Leith, Q.C. (Mr. J. Arathoon with him) for the appellant.—This objection is made at too late a stage of the proceedings. The respondent should have proceeded by a preliminary motion—*Shire v. Shire* (2). If the objection should be allowed to prevail, it is still open to their Lordships to grant special leave by an order *nunc pro tunc*. This is a fit case for the exercise of such power.

Mr. Doyne in reply.—The case is not one in which special leave should be given. The appellant can have no remedy though the appeal be heard.

(1) 14 B. L. R., 394.

(2) 5 Moore's P. O. Ca., 81,

Their Lordships' judgment was delivered by

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MR. M. E. SMITH.—This case comes before their Lordships under circumstances of great irregularity in the proceedings. The leave to appeal, granted by the Judicial Commissioner, Mr. Currie, is clearly *ultra vires*, and therefore the appeal is now before them without any proper authority. Mr. Doyne has taken the objection that the appellant is in that position. He was met by a counter-objection on the part of Mr. Leith, that the respondents could not now be heard to object, inasmuch as they had not done so at an earlier period when they first became aware that the irregular petition of appeal had been lodged. Their Lordships think that the right practice is to take objections of this kind at the earliest moment, for the obvious reason that the great expense of preparing for the hearing is thereby saved, which is uselessly incurred if, when the objection is ultimately taken, their Lordships feel obliged to yield to it. But although their Lordships think that the objection should be taken at an early period, it is clearly competent to them to hear it at any stage of the appeal; and it has not been unusual to entertain it when the appeal is called on, and before the argument upon the merits has been commenced. Mr. Doyne has taken it at that time, and their Lordships think his objection ought to prevail. Mr. Leith then suggested that he desired to apply to this board for special leave to appeal; and no doubt there have been cases where, upon the appeal being called on and the objection discussed, their Lordships have given special leave to appeal, *nunc pro tunc*, directing that the petition to appeal should go to Her Majesty with the report upon the appeal itself. An appellant, however, cannot be in a better position with regard to the application than that in which he would have stood if he had made it at an earlier period; and their Lordships have had to consider whether or no this is a case in which they ought to grant special leave to appeal; and they have come very clearly to the conclusion that it is not.

It seems that the plaintiff is mortgagee, and the original defendant, Emam Ali Beg, was mortgagor. Emam Ali Beg is

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dead; his two widows are on the record, and there is a third party now on the record as an intervenor, the Raja of Bhinga, the respondent, who became a purchaser of the estate from Emam Ali Beg or of some interest in it. The original suit was for foreclosure of the mortgage, in which various questions as to the right to tack and other matters arose; and it seems that before a decree of foreclosure was finally obtained, a compromise was entered into between the plaintiff and Emam Ali Beg. The compromise contained the following terms:—
 “That the plaintiff is to get Rs. 10,000, the balance remaining after remission of a certain sum an account of interest recently accruing out of the aggregate amount of the principal, costs, and interest accruing up to the month of November 1868. That from 1st December 1868 the defendant is to be liable for interest at the rate of Rs. 1-8 per cent. per mense m. That the defendant’s rights and interests in the village are to remain as before hypothecated to plaintiff, mortgagee. That defendant is to put the plaintiff in possession of the estate, and to have the mutation of names effected in the Collector’s Register of Proprietors, before Baisakh 1276 F.” (i.e., before the 28th March 1869). “Plaintiff is to appropriate the proceeds towards payment of the interest due. Defendant is to pay to plaintiff the whole amount in cash due to him within two years from this day, in the case of the mutation of names having been effected in favor of and possession given to plaintiff.”

It seems that the defendant did pay into Court a sum of about Rs. 10,700, the Rs. 700 being for interest, in pursuance of this compromise, and that the plaintiff refused to accept it or to take it out of Court, upon the ground that by the terms of this compromise he was entitled to have the possession of the estate for two years, and a mutation of names, and afterwards to get this money. He petitioned the Court to give effect to this contention; but the Deputy Commissioner rejected the application, and stated that the petitioner refused the money at his own risk, and would receive no interest from the time it had been paid into Court. This rejection was confirmed on appeal. The money having been thus refused, it appears that an order (dated 26th April 1869) was made by the Deputy commissioner

for the repayment of the deposit of Emam Ali Beg. That was an irregular proceeding. The money ought not to have been paid out without notice. However, that was done. Thereupon began a set of proceedings on the part of the plaintiff, the mortgagee, to have the compromise carried into effect, which has led to the present appeal. It seems that the plaintiff contended that he was entitled to have a decree of foreclosure in consequence of the withdrawal of the money. It is sufficient to say that the Deputy Commissioner held that he was entitled to the money, but not to a decree of foreclosure. The Officiating Commissioner reversed that decision, and held that he was entitled to foreclose. The case then came before Mr. Capper, the Judicial Commissioner, and, on the 28th June 1870, he made a decree reversing the decree of the Officiating Commissioner, setting up that of the Deputy Commissioner, and holding that the plaintiff could not have that relief. In the course of his judgment Mr. Capper says:—"It is not denied that this was a full payment of the sum due under the compromise and consequently on that date all the conditions and stipulations of the mortgaged, contract, and all rights accruing under it to the mortgagees, actually ceased, and were at an end." He also says the Raja, the intervenor, "has agreed in Court to repay the Rs. 10,725 withdrawn, and it is asserted that this amount is actually in deposit in the treasury of the Deputy Commissioner." It appears Mr. Capper was not rightly informed, and that this money had not been so deposited, although it had been agreed that it should be. It is against this order that their Lordships are now for the first time, in March 1875, asked to grant special leave to appeal.

Several subsequent proceedings have taken place. There was a petition for review, heard by Mr. Capper himself, who rejected it; and then the plaintiff filed proceedings, which it is difficult to characterize. There is a claim or petition to revive the decree of foreclosure, which had been reversed on appeal; another petition to review Mr. Capper's decision and to revive the decree of the 5th January 1869, upon the ground that this money having been taken out after it was deposited, the plaintiff ought to be restored to the former state of things.

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But matters had greatly changed. The Raja of Bhinga had come in as purchaser, and his rights as purchaser have never been tried. There are, it appears, conflicting contentions on the part of the Raja and the representatives of Emam Ali Beg, which have not been determined. These petitions came on before Mr. Ouseley, the then Officiating Commissioner, and he, it appears, felt some difficulty in dealing with them. He says in his judgment :—" It seems to me that at this stage of the proceedings the only thing that can be done is to call on the Raja of Bhinga to show cause why he should not pay the money which he agreed in Court to pay." The council for the Raja apparently objected to that, on the ground that the case was not heard in review of judgment, and that the Court could not call on his client to show cause why he should not pay the money. It does not appear what was done before Mr. Ouseley upon that objection.

Then the case comes before Mr. Currie, who apparently feeling the same difficulty, declined to admit a review of the order. He says this :—" As Mr. Capper has already declined to admit a review of this order, and as the entire facts of the case as above detailed were before him at the time he passed his order, I do not feel justified in admitting his order to review ; but taking the entire circumstances into consideration, and being of opinion that the plaintiff was justified in urging his claim to possession under the deed of compromise, and that the defendant fraudulently withdrew the money out of deposit before that point was determined, I am of opinion that the case is one which may properly be appealed to Her Majesty's Privy Council."

The Judicial Commissioner, therefore, feeling unable to give any relief himself, without any application apparently on the part of the plaintiff, grants leave to him to appeal to Her Majesty in Council, which, as already observed, it was beyond his power to do.

Under these circumstances, their Lordships think it would be a wrong exercise of their judicial discretion to grant the special leave now applied for. There are only two grounds on which it is suggested that the appeal ought to be heard. The first

is that Eman Ali Beg did not pay the proper amount into Court under the compromise. It seems to have been suggested in the course of the proceedings that a small sum of Rs. 7 had not been paid in. Whatever may be the case in a proceeding where the party is entitled to avail himself of the strict law, it is obvious their Lordships would not give special leave to appeal upon any question of that kind. The other and substantial ground upon which alone leave could be granted, if at all, is that there is a large sum of money, to which the plaintiff is clearly entitled, withdrawn under the circumstances already alluded to. How that sum is to be recovered, and what are the rights of the plaintiff arising from its withdrawal, and against whom, it is not for their Lordships, in dealing simply with the preliminary question of leave to appeal, to determine. It is enough to say that they think those rights may be ascertained more satisfactorily in some other proceedings than by this tribunal under the irregular appeal which has been sent up.

Their decision dismissing the appeal being upon the ground that the appeal is not properly before them will not of course prejudice any rights the plaintiff may have either against the representatives of Eman Ali Beg or the Raja of Bhinga.

Under these circumstances, their Lordships will humbly advise Her Majesty to dismiss the appeal. But this being upon a preliminary objection, only taken when the appeal was called on to be heard upon the merits, their Lordships think that there should be no order as to costs.

Appeal dismissed.

Agent for the appellant: Mr T. L. Wilson.

Agent for the respondents: Mr. H. Earle.

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 April 21 &
 May 13.

SAH MUKHUN LALL PANDAY (DEFENDANT) v. SAH KOONDUN LALL AND ANOTHER (PLAINTIFFS).

[On appeal from the High Court of Judicature for the North-West Provinces of Bengal.]

Registration—Act XX of 1866, ss. 22, 24, 36, 49, & 88—Limitation—Act VIII of 1859, ss. 246 & 247—“District Court”—Jurisdiction of High Court, N. W. P.

Ss. 22 and 24 of Act XX of 1866, make it imperative that the instruments therein referred to shall be presented for registration within four, or at most eight, months from the date of their execution; but the Act fixes no time within which the registration must be completed.

Where the registration of an instrument has been declared by a competent Court to be invalid, the instrument, if originally presented in due time, may again be submitted for registration, although the four months provided by s. 22, Act XX of 1866, and the further period of four months allowed by s. 24, have both expired.

A registering officer who registers a deed of sale without the vendor who executed the deed having appeared before him, acts in contravention of s. 36, Act XX of 1866; but there are no words in that section which declare that the registration of a deed under such circumstances shall be null and void.

Quere.—Whether the words of that section are not merely directory to the registering officer for the benefit of the parties to the deed; and whether his acting without the appearance of the parties as provided by the Act is more than a defect of procedure within the meaning of s. 88.

In considering the effect to be given to s. 49, Act XX of 1866, that section must be read in conjunction with s. 88, and with the words of the heading of Part x, “Of the effects of Registration and Non-registration.” It is not clear that the words of s. 49, “unless it shall have been registered in accordance with the provisions of this Act,” are not confined to the procedure on admitting to registration, without reference to any matters prior to registration, or to the provisions of ss. 19, 21, or 36, or other provisions of a similar nature.

For the purposes of Act XX of 1866, “District Court” means “the Principal Court of original jurisdiction in a District, and includes the High Court in its ordinary original civil jurisdiction.” The High Court of the North-West Provinces, which has no ordinary original civil jurisdiction, is consequently not a “District Court” to which a petition may be presented under s. 84 of the Act, and an order passed by that Court, on such a petition, directing the registration of a deed, is made without jurisdiction.

* *Present*:—SIR J. W. COLVILLE, SIR B. PEACOCK, SIR M. E. SMITH, AND SIR R. P. COLLIER.

. Certain lands having been attached in execution of a decree obtained by *A* against *B*, *C* intervened under s. 246, Act VIII of 1859, claiming their release, on the ground that before the attachment they had been conveyed to him by *B* under a deed of sale, and he prayed that the execution-sale might be stayed to enable him to put in the deed after having it registered. The Court however refused to stay the sale, and the lands were sold in execution. More than a year from the date of the Court's refusal to stay the sale, *C* sued to establish his right to the lands. *Held* that the suit was not barred by limitation under s. 246, Act VIII of 1859, since the refusal of the Court to postpone the sale was not an order under that section, but was a mere refusal to order a postponement under s. 247.

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APPEAL from a decision of the High Court at Allahabad, North-West Provinces dated 8th April 1873.

In the suit in which this appeal was preferred, the plaintiffs, relying on a deed of sale from the former owners, sought have their absolute proprietary right in certain lands declared as against the defendant, who, subsequently to the date of the execution of the said deed, had purchased the interest of the plaintiffs' vendors in the said lands at a sale in execution of a decree.

The decision of the Subordinate Judge of Cawnpore in whose Court the suit was brought was in favor of the defendant, but was reversed on appeal by a Division Bench of the High Court of the North-West Provinces on the 8th April 1873. The present appeal is from the judgment of the latter Court.

The material facts of the case, together with the questions of law raised on the appeal, are fully stated in their Lordships' judgment. No one appearing for the respondents, the case was heard *ex parte*.

Mr. Doynes, for the appellant, contended that the deed of sale on which the plaintiffs relied had been improperly admitted to registration, and was consequently, under the provisions of the Registration Act of 1866, inadmissible as evidence and inoperative. He further contended that the plaintiffs' suit having been brought more than a year from the date of an order passed by the Court executing the decree rejecting an application which

1875 the plaintiffs had then made for a postponement of the sale, the claim was barred under s. 246, Act VIII of 1859.

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LALL PANDAY

9.
SAR KOONDUR
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Our. adv. vult.

The judgment of their LORDSHIPS was delivered by

Sir. B. PEACOCK.—The respondents in this appeal were plaintiffs in the suit. They sued to set aside the auction-sale of one-half of Mauza 'Naila, which the defendant, the now appellant, on the 20th March 1871, caused to be sold in execution of a decree which he had obtained on the 24th of August 1868 against Gungha Singh and others, and which half of the mauza he himself purchased at that sale for Rs. 11,025.

The claim was founded upon a deed of sale executed by the said Gungha Singh and others, by which they conveyed the property in dispute to the plaintiffs. It was at one time contended that the property was under attachment at the time of the execution of the deed of sale; that the deed was not proved to have been executed on the 10th of July 1868, the day of its date; and that it was collusive. But those objections have been abandoned, and it must now be taken that the deed was executed *bona fide* and for a valuable consideration on the said 10th of July 1868 before the property was under attachment.

The principal question to be determined is whether the plaintiffs are entitled to avail themselves of the deed. It was contended on the part of the present defendant that the deed was not admissible in evidence, and that it could not be acted upon, or held to have conveyed to the plaintiffs the property comprised therein; and the ground upon which he relied was that the deed had not been registered in accordance with the provisions of Act XX of 1866. It is not disputed that the deed was presented for registration to the proper officer in due time, viz., on the 22nd October 1868, within the period of four months from the date of its execution; but the vendors did not appear before him. They were consequently summoned under

the provisions of s. 37, but did not appear on the 10th November 1868, the day fixed for their attendance, whereupon the registering officer, having satisfied himself by the depositions of witnesses and otherwise that the deed had been executed by the vendors, registered it.

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On the 12th of November 1868, the property was attached in execution by the present defendant under his decree against the vendors, whereupon the present plaintiffs intervened and objected under s. 246 of the Code of Civil Procedure (Act VIII of 1859) that the property had before attachment, been conveyed to them by the deed of the 10th of July. It was at that time admitted by all parties, including the present defendant, that the plaintiffs were in possession of the property, and that the deed of sale had been registered; and under those circumstances the property was, on the 15th December 1868, ordered by the Subordinate Judge to be released.

Subsequently a suit was brought by the appellant, the present defendant, against the respondents, the present plaintiffs, to set aside the deed of sale as collusive, and as having been executed whilst the manza was under attachment, and as having been illegally registered. The Subordinate Judge, on the 29th May 1869, held that the manza was not under attachment at the time of the execution of the deed, but that inasmuch as the deed had been registered in the absence of the vendors, it must be considered as an unregistered document, and was not admissible in evidence, and consequently that it could not take effect in opposition to the rights of the decree-holder so as to preclude him from selling the property in execution of the decree. The case was appealed to the High Court, who, on the 10th November 1869, affirmed the decree (1). They said:—

“The law directs (s. 36) that no document shall be registered under the Act unless the persons executing such document, or their representatives, assigns, or duly authorised agents, appear before the registering officer. The Registrar was not authorised, therefore, to register this deed in the absence of the vendors and of their agents merely because he was satisfied that there had been a sale pursuant to a

(1) 1 All. H. C. Rep., 168.

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previous agreement for purchase, and further a power given to the vendor's agents authorising them to procure registration. The 40th section of the Act contains powers for compelling the attendance before the Registrar of persons whose presence is necessary for the due registration of deeds, but there is no provision enabling registering officers to proceed of their own authority to register in the absence of such persons.

"We are of opinion that the decision of the Subordinate Judge on this point is correct. It has been argued that the deed, having been in fact registered is entitled to the privileges of a registered deed, notwithstanding any error on the part of the Registrar; but it is clear (s. 49) that unless a deed has been registered in accordance with the provisions of this Act, it must be regarded as unregistered, notwithstanding that it may, in fact, have been improperly admitted to registration."

On the 29th August 1870, the plaintiffs again applied to the registering officer to have their deed registered, but the application was refused by the Registrar. His grounds for refusal were thus stated:—

"This deed has been declared to have been illegally registered, and was therefore treated as not having been registered. Application is now made for registration, but is refused as being presented beyond the proper period."

The refusal to register was not endorsed on the deed.

On appeal to the Registrar-General he refused to order the deed to be registered upon the ground that it must be deemed to have been duly registered on the 10th of November 1868; whereupon the plaintiffs petitioned the High Court, who on the 24th February 1871, held that the plaintiffs were entitled to have the deed registered, and directed its registration in the proper manner after the usual inquiries. They said:—

"The deed was duly presented for registration within four months from the date of execution, but it was not then duly registered in accordance with the provisions of the Act, as we have already determined. Having considered the reasons given by the Registrar and the Registrar General for subsequently refusing registration, we think them insufficient. The deed is entitled to registration, no legal impediment appearing, and we direct its registration in the proper manner, after the usual inquiries."

On the 18th March 1871, the plaintiffs petitioned the Judge ¹⁸⁷⁵ of Cawnpore, stating that the sale of the property under the ^{SAN MOKHUM} defendant's execution had been fixed for the 20th of that month. ^{LALL PANDAY} and, relying upon the order of the High Court, prayed that the ^{v.} sale of the property under the execution might be postponed; ^{SAN KOONDUM} but the application was refused upon the ground that the deed ^{LALL} had not then been registered. The sale accordingly took place on the 20th of March 1871, when the property now in question was purchased by the defendant for Rs. 11,015, of which Rs. 10,081 were retained in satisfaction of decrees which he had obtained against the vendors and their representatives, including the decree of the 24th of August 1868, and the remainder was paid by him in cash.

On the 20th April 1871, more than thirty days after the order of the High Court, the plaintiffs petitioned the Registrar that the vendors and the heirs of the deceased vendors might be summoned, and the deed registered according to the requirements of the law. Thereupon compulsory process was issued, and the deed was registered on the 16th and 25th of May, and 5th of June 1871.

On the 20th April 1872, the present suit was commenced. The case was heard by the Subordinate Judge, who held that the deed had then been legally registered, but that the sale to the plaintiffs was collusive, and that the claim to set aside the auction-sale could not be maintained, inasmuch as in the former suit between the same parties it had been held that the defendant, the present respondent, was entitled as against the plaintiffs, the present appellants, to bring the property to sale under the execution; and he dismissed the plaintiffs' suit.

Upon appeal the High Court held that the deed was not collusive; that it was executed *bonâ fide* for a valuable consideration; that it had then been registered, and that the rights created by it must be held to have come into existence at the time the deed would have commenced to operate had no registration been required; and they reversed the decree of the Subordinate Judge, and decreed the claim of the plaintiffs for the establishment of their rights. They also held that the present suit was not barred by the decision in the former

1875 suit, as the point therein decided was not whether the appellants would have been entitled to resist the sale in execution if their deed had been duly registered, but whether or not the deed had at that time been duly registered.

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The only questions now to be determined are:—

1. Whether the subsequent registration of the deed was valid and effectual to render the deed admissible in evidence and operative; and—

2. Whether the suit is barred by limitation under s. 246 Act VIII of 1859, in consequence of its not having been commenced within one year from the date of the order of the Subordinate Judge of the 18th March 1871, refusing to postpone the sale.

There can be no doubt that the registering officer acted in contravention of s. 36 in registering the deed without the vendors having appeared before him; but it is not necessary for their Lordships to determine whether the registration was a nullity, or whether the error was one of which a stranger to the deed could take advantage. It may, however, be observed that there are no words in s. 36 declaring that the registration of a deed shall be null and void if made without the appearance of the persons who executed it; and it is very doubtful whether the words of that section are not merely directory to the registering officer for the benefit of the parties to the deed, and whether his acting without the appearance of the parties and upon evidence, instead of the admission of the parties, of the execution of the deed, was more than a defect in procedure within the meaning of s. 88. Again, it is not clear that the words "unless it shall have been registered in accordance with the provisions of this Act" in s. 49 are not, especially as regards strangers to the deed, confined to the procedure on "admitting to registration" without reference to any matters of procedure prior to registration, or to the provisions of ss. 19, 21, or 36 of the Act, or other provisions of a similar nature. In considering the effect to be given to s. 49, that section must be read in conjunction with s. 88, and with the words of the heading of part x, "Of the effects of Registration and Non-Registration." Now,

considering that the registration of all conveyances of im-
môveable property of the value of Rs. 100 or upwards is, ¹⁸⁷⁵
by the Act, rendered compulsory, and that proper legal advice ^{SAH MUKHUN}
is not generally accessible to persons taking conveyances of ^{LALL PANDAY}
land of small value, it is scarcely reasonable to suppose that it ^{v.}
was the intention of the Legislature that every registration of ^{SAH KOONDUN}
a deed should be null and void by reason of a non-compliance ^{LALL}
with the provisions of ss. 19, 21, or 36, or other similar
provisions. It is rather to be inferred that the Legislature
intended that such errors or defects should be classed under
the general words "defect in procedure" in s. 88 of the Act,
so that innocent and ignorant persons should not be de-
prived of their property through any error or inadvertence of
a public officer on whom they would naturally place reliance.
If the registering officer refuses to register, the mistake may
be rectified upon appeal under s. 83, or upon petition under
s. 84, as the case may be: but if he registers where he ought
not to register, innocent persons may be misled, and may not
discover, until it is too late to rectify it, the error by which, if
the registration is in consequence of it to be treated as a nullity,
they may be deprived of their just rights. It is unnecessary,
however, to express any opinion upon this point, as it has been
decided between these parties that, notwithstanding the first
registration, the deed must be considered as unregistered.
Neither of the parties appealed from the decision, and, there-
fore, whether right or wrong, in point of law, they are both
bound by it in this suit, and it must be assumed as against them
in this appeal that the first registration was a nullity.

The plaintiffs do not rely upon the registration of the 10th
November 1868, but on the registration of the 16th and 25th
of May, and the 5th of June 1871.

The defendant contends that those acts of registration were
inoperative.

" 1. Because, in ordering the subsequent registration, the High Court
acted without jurisdiction, and their order and all proceedings had
there under are nullities, and the respondents' alleged deed is inad-
missible in evidence.

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" 2. Because, irrespective of the question of jurisdiction, the High Court, in so ordering registration after the lapse of more than eight months from the alleged date of the deed, impugned the express provisions of the Registration Act; and their order is not binding upon this appellant, who was not a party before the High Court at that time.

" 3. Because, assuming that the High Court had jurisdiction, and that their order was in accordance with the provisions of the Registration Act, the respondent did not present his alleged deed within thirty days after the making of the said order."

As to the first of those reasons their Lordships are of opinion that the High Court, in ordering the registration of the deed, acted without jurisdiction under s. 84. That section authorises a petition to the " District Court," which is defined to mean the " Principal Court of original jurisdiction in a district, and includes the High Court in its ordinary original civil jurisdiction." The High Court of the North-West Provinces, however, has no ordinary original civil jurisdiction, either in Cawnpore, or in any other district.

It was not, however, necessary to have an order from the District or other Court to authorise the re-registration. The deed had been presented for registration within the period required by s. 22, it had been accepted for registration, and it had been registered in fact. The vendors having neglected to appear before the registering officer on the 10th of November 1868, that officer might have proceeded, under s. 40, to compel their attendance; but instead of doing that he by mistake, registered the deed, after satisfying himself that it had been executed. When it was declared by a competent Court that the registration was invalid, the registering officer might still have proceeded to compel the appearance of the vendors, and, upon their appearance and admission of the execution of the deed, to register it. Though the Statute makes it imperative to present an instrument for registration within four months from the date of its execution, no time is fixed within which a deed presented and accepted for registration must be registered; and, indeed, from the nature of the

requirements of the Act, the period within which the registration must be completed could not have been fixed.

It does not appear to their Lordships that the orders of the Registrar-General and of the Registrar, of the 11th October and 20th September 1870 respectively, imposed upon the plaintiffs the necessity of petitioning the District Court, under s. 84, to order the registration of the deed, or precluded the registering officer from voluntarily registering it after the appearance of the vendors and their admission of its execution.

Those orders, whilst there was a *de facto* registration in existence, do not appear to amount to a refusal to register or to order registration within the meaning of the 82nd section. The latter of those orders assumes that there was a registration. Indeed, it was not even stated as one of the reasons for this appeal that the registrations made on the 16th and 20th May, and 5th June 1871, were invalid, because they were made after those orders. If the registering officer was influenced by the order of the High Court to do that which he might have done without it, the fact that the High Court acted without jurisdiction did not invalidate the registration.

The High Court having acted without jurisdiction, the second and third objections to the registration fall to the ground.

As to the objection on the ground of limitation, their Lordships are of opinion that the refusal of the Subordinate Judge of the 20th of March 1871, to postpone the sale under the execution, was not an order under s. 246, but was a mere refusal to order a postponement of the sale under s. 247.

Their Lordships will humbly advise Her Majesty to affirm the judgment of the High Court and to dismiss this appeal.

Appeal dismissed.

Agent for the appellant : Mr. T. L. Wilson.

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FULL BENCH.

Before Mr. Justice Macpherson, Officiating Chief Justice, Mr. Justice Jackson, Mr. Justice Pontifex, Mr. Justice Birch, and Mr. Justice Morris.

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HURRI SUNKER MOOKERJEE (PLAINTIFF) v. MUKTARAM PATRO (DEFENDANT).*

Act VIII of 1859, s. 2—Res Judicata—Suit for Arrears of Rent—Act X of 1859—Beng. Act VIII of 1869—Jurisdiction of Collector.

Held (JACKSON, J., dissenting), that a judgment by a Collector, in a suit under Act X of 1859, declaring the plaintiff entitled to assess rent upon land alleged by the defendant to be lakhiraj, is not conclusive in a subsequent suit between the same parties for arrears of rent under Beng. Act VIII of 1869.

Per JACKSON, J.—A decision in a previous and similar suit upon an issue raised substantially in the same manner by parties in a Revenue Court is binding upon them as evidence in a subsequent suit, which, but for the passing of Beng. Act VIII of 1869, would also have been brought in a revenue Court.

THIS was a suit brought under Beng. Act VIII of 1869 to recover rent at an enhanced rate after notice. As to a portion of the land the tenant pleaded that it was rent-free. It appeared that a similar suit had previously been brought between the same parties in the Collector's Court whilst Act X of 1859 was in force, and the right of the plaintiff to assess rent on this portion of the land was then expressly declared, the declaration being affirmed on special appeal (801 of 1870) by the High Court. The rent, however, was not assessed, the High Court thinking that there were no sufficient materials for doing so. The Munsif accepted the declaration in the former suit as conclusive upon the question of the plaintiff's right to collect rent on this portion of the land, and gave the plaintiff a decree. The District Judge considered that this declaration was not binding, nor even evidence in the

*Special Appeal, No. 1396 of 1874, from a decision of the Officiating Judge of West Burdwan, dated the first April 1874, affirming a decree of the Munsiff of Bacunda, dated the 17th December 1873.

present suit, and holding that there was no proof that this portion of the land had ever paid rent dismissed the whole suit. On special appeal by the plaintiff to the High Court, the question raised was whether the declaration as to the plaintiff's right in the former suit was binding in the present suit.

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The special appeal was heard by Markby and Mitter, JJ., who differed in opinion; the former being of opinion that it was not conclusive, and the latter referring to *Ooma Churn Dutt v. Beckwith* (1), considering that it was. That being a conflicting decision, the question was referred to a Full Bench. "Whether the judgment in Special Appeal 801 of 1876 is conclusive upon the parties in this suit that the landlord is entitled to recover rent in respect of the lands to which that decision relates?"

The following judgments were delivered in referring the question:—

MARKBY, J. (after stating the facts as above, continued):—According to the decision of the Privy Council in *Nuffershunder Paul Chowdkry v. Poulsen* (2), it was proper in the former suit to determine the right to enhance the rent, although for other reasons the suit failed: that is to say, assuming of course that the Court was competent in that case to make a binding declaration of right between the parties, in the same way as an ordinary Civil Court could do so. The question, therefore, is whether the Collector's Court could make such a binding declaration.

In the case of *Khagowlee Sing v. Hossein Bux Khan* (3), it appeared that, in March 1863, certain persons (whom I may call A and B) brought a suit against another person (whom I may call C) in the Collector's Court. They alleged he was occupier of a small portion of land under a potta and kabuliati. C denied the case set up by A and B: he said that a transaction with reference to this property between himself and A and B, which took place in 1843, was not an absolute sale, but only a conditional sale of the property to A and B, and he produced the

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ikrarnama, and contended that, under a particular stipulation in it, he and another person who joined him in the transaction were entitled to hold 75 bigas rent-free. A and B denied the validity of the ikrarnama. The Collector, after taking the evidence, held that C had proved the ikrarnama, and dismissed the suit. The Zilla Judge on appeal also dismissed the suit, but upon the ground that A and B had not proved that C was a cultivator paying rent, and also upon the ground that their claim was barred by limitation. The Sudder Court in special appeal confirmed the Zilla Judge's decision, observing that the question whether the sale to A and B was absolute or conditional, did not arise in the case. Subsequently, C and others brought a suit against A and B to redeem the property, when the question of the validity of the ikrarnama was again raised. The question was whether the finding of the Collector on this point was conclusive. Upon this the Privy Council say that the Collector's finding that the ikrarnama was genuine, even if final, was " incidental ; " and this for two reasons : first, because the question before him was not the issue raised in the second suit ; and, secondly, because his decision was not that of a Court competent to adjudicate on a question of title. He had only a special jurisdiction to try summary suits for the recovery of rent, consequently the *eadem causa petendi* and a judgment of a Court of competent or concurrent jurisdiction were both wanting.

This is an exposition of the law by the highest authority, which is binding upon us.

I do not think the declaration in the former decree is excluded in the present case on the first of the grounds mentioned by the Privy Council. The former was a suit to recover rent at a higher rate than was paid before, after notice : so is the present suit. The question raised in both cases is the same, whether the land is liable to pay rent at all.

The only ground, therefore upon which the former decree can be excluded is the second of the grounds mentioned by the Privy Council, namely, that the Collector had only a special jurisdiction to try summary suits for rent, and was not competent to adjudicate (*i. e.*, finally determine) a question of title. This

appears to me to be a ground perfectly distinct and separate from the other, and the decision of the Privy Council being based upon both grounds, each *ratio decidendi* is binding upon us.

The question then is reduced to this :—Whether the question before the Collector in the former suit between these parties was a question of title which the Collector had not jurisdiction finally to decide. Upon this point it seems to me that the judgment of the Full Bench in *Chunder Coomer Mundul v. Nunnee Khanum* (1) is material. In that case one Backer Ali had brought a suit for possession against his landlord in the Collector's Court claiming to hold the land under a maurasi potta. The landlord denied the genuineness of the potta, and, upon an issue raised, the potta was found to be genuine, and Backer Ali got a decree, for possession. Subsequently, the landlord brought a suit against Backer Ali to get back the possession of the same lands. The decision of the Collector, which had been affirmed on appeal up to this Court, was held not to be conclusive. The late Chief Justice, sir R. Couch, in delivering Judgment, says :—"The deputy Collector had no jurisdiction to give effect to the potta as a permanent title. He could only use it as showing that at that time the plaintiff had a right to the possession of the land." Phear, J., says :—"Now it must be observed at the outset that the Collector's Court was a Court of limited jurisdiction, and that it had no power to determine between the parties a question of right to the land larger than the bare right to possession. It so happened that the plaintiff's right to possession, as he alleged it, was clothed with maurasi incidents ; but the Collector's Court had not authority to determine whether such incidents existed or not : and indeed it is for this very reason that the Munduls are undoubtedly entitled, notwithstanding the Collector's decision against them in the former suit, to come in to the Civil Court to have the question as to the maurasi right tried in the present suit. If they are here to be successfully met with the objection that the Collector has already finally determined the question of the validity of the potta, then it is obvious the result is that the

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(1) 11 B. L. R., 484.

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Collector has indirectly, if not directly, determined a question between the parties which was beyond his powers, and has in effect ousted the Court of superior jurisdiction; for the latter will have nothing left to it, but to, in effect, register the Collector's decision." My own judgment in that case is based entirely upon the decision of the Privy Council in the case above cited. Ainslie, J., concurred with the Chief Justice, and Jackson, J., expressed no decided opinion. Subsequently, when speaking of that case, Jackson and Ainslie, JJ., expressed their opinion that the judgments of all the Judges proceeded entirely upon the limited and exclusive character of the jurisdiction of the Revenue Court (1). Other considerations are certainly adverted to by the Chief Justice and by Phear, J., but the passages I have quoted show that both those learned Judges consider that the question was one upon which the Collector had not power finally to adjudicate. The opinion of Phear and Ainslie, JJ., is further illustrated by the case of *Meer Babur Ali v. Shaikh Dowlut Ali* (2). There a suit had been

(1) In *Mohima Ohunder Mosoom-dar v. Asadha Dassia*, post, p. 251.

(2) Before Mr. Justice Phear and Mr. Justice Ainslie.

The 3rd March 1873.

MEER BABUR ALI AND] ANOTHER
(PLAINTIFFS) v. SHAIKH DOWLUT
ALI AND OTHERS (DEFENDANTS).*

Act VIII of 1859, s. 2—*Res Judicata*
—*Suit for Rent—Jurisdiction of*
Collector.

In a suit for rent under Act X of 1859 the Collector has no jurisdiction to decide a question of mukarrari title otherwise than so far as it may be incidental to the determination of the amount of rent, if any, due; and his decision on such a question is therefore not binding in a subsequent suit to establish the mukarrari right.

THIS was a suit to establish a mukarrari tenure. The plaintiff in this case was defendant in a previous suit for arrears of rent brought against him before the Collector. He there stated in answer that he had a mukarrari tenure of the land. The Collector disbelieved his story and gave a decree against him. He then brought the present suit and sought an adjudication of his mukarrari rights. The defendant objected that the question of mukarrari had already been determined by the Collector in the previous suit, and that the plaintiff could not ask to have the same question tried again. The Munsif made a decree in favor of the plaintiff. On appeal the Judge reversed the Munsif's judgment and decided against the plaintiff on

* Special Appeal, No. 288 of 1872, against a decree of the Judge of Zilla Tirkoot, dated the 29th June 1871, reversing a decree of the Munsif of Muzzaffarpore, dated the 22nd February 1871.

brought in the Collector's Court for rent, and in answer to the claim the tenant set up a mukarrari potta which the Collector

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the ground that the question of mukarrari was *res judicata*.

Baboo Dabender Narain Bosa for the appellants.

Mr. C. Gregory and Moonshee Mahomed Yusoof for the respondents.

The judgment of the Court was delivered by

PREAR, J.—In this case the lower Appellate Court expresses its opinion that the plaintiff has established his case, unless a statement which he made upon oath on a former occasion is to be taken against him. In that event, however, the Judge is of opinion that that statement weighs so heavily against his present claim as to oblige the lower Appellate Court to dismiss it.

The Judge has received this evidence, and according to this view dismissed the plaintiff's suit.

The essence of the whole matter is shortly this, namely, that in the present suit the plaintiff claims to hold certain land on a mukarrari tenure, and on the former occasion when he was examined as a witness in a suit for assessment of mesne profits between third parties, he stated various facts with regard to the land which he then cultivated and still cultivates, but omitted to say anything about holding any portion of it on a mukarrari tenure. The Judge thinks that his omission on that occasion to say anything of the mukarrari raises so strong an inference that he had not at that time any mukarrari as to overweigh the whole of the case which he has been able to make in this suit, in support of this mukarrari.

It appears to us that the Judge has given an undue importance to the omission in the plaintiff's former statement of any mention of the mukarrari. The circumstances under which that statement was made do not appear to have been such as necessarily or naturally to call for such mention. Indeed, if he had mentioned it, there might I think have been some reason to say that he was stating facts which were irrelevant to the purpose of his examination, and possibly doing so for some ulterior purpose. It is rather hard upon him that, because he did not say that which it does not now appear there was any cause for him then to say, therefore his present claim, which is as the Judge says, otherwise satisfactorily made out should be dismissed.

It has, further been urged in support of the judgment of the Appellate Court that this matter of the mukarrari has already been finally adjudicated upon by a competent Court; for it appears that on a former occasion the present defendants brought a suit against the present plaintiff for arrears of rent, and in answer to the claim so made, the present plaintiff set up his very mukarrari tenure now in question, and it was disbelieved by the Collector. It seems to me, however, that that fact does not constitute a *res judicata* as between the parties with regard to the mukarrari right. The only thing that the Collector in strictness adjudicated was that a certain amount of rent was at the time from the present plaintiff to the present defendant due. He had no jurisdiction to determine the question of mukarrari right between the parties otherwise than so

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disbelieved. This was held not to be conclusive in a second suit in the ordinary Civil Court between the same parties in which the mukarrari potta was again put forward. These learned Judges say the Collector had no jurisdiction to try the question of mukarrari right between the parties otherwise than so far as it might be incidental to the question of rent due or not due which was before them.

This limited view of the powers of a Revenue Court is probably not that which a person would arrive at—it is certainly not that at which I arrived myself—by reading Act X of 1859 without reference to the general status and estimation of the Revenue Courts in this country. It would probably be considered (especially with reference to the course of appeal laid down in s. 153) that, under the new provisions introduced by Act X of 1859, questions of title might be determined finally by suits instituted in the Revenue Courts. But the result of all the decisions after much conflict is that this cannot be done. The two principal authorities on the subject, the decision of the Privy Council and of the Full Bench, although no doubt other considerations are adverted to, lay down distinctly that, whether, the landlord sue in the Revenue Court for rent or possession, that Court has only jurisdiction to determine the bare right to possession in one case, and the bare right to the rent in the other. I do not see how any substantial distinction can be made between a case where a landlord sues for rent at the old rate, and where he sues for rent at a higher rate, or between the case where the tenant sets up a mukarrari title and where he sets up a lakhiraj title. In fact, I thought when the Full Bench case was decided, and I think still that, when once it has been held that Collectors have only a jurisdiction of a special and a summary character for the recovery of rent, it is impossible to hold that their decisions are binding as declarations of right between the parties.

far as it might be incidental to the Court for the reason which it has question of rent due or not due which given. I think the appellant ought was before him. On the whole then to succeed, and the decree of the it seems to me that the lower Appel- lower Appellate Court should be late Court has committed an error in reversed with costs. reversing the decision of the first

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In my opinion, therefore, so far as the plot of land is concerned which the defendant claims to hold rent-free, the appeal ought to be dismissed, the only objection of law taken to the finding of the District Judge having failed. But my learned colleague is, I regret to say, of a different opinion. I understand that he considers the case of *Ooma Churn Dutt v. Beckwith* (1) to be an authority for holding that the Collector had jurisdiction finally to determine the right to recover rent in respect of these lands as between these parties. I cannot deny that it is so; and as that case has not been expressly overruled, it is better to refer this question to the Full Bench.

If the Full Bench shall be of opinion that this judgment is not conclusive, still I think it ought to have been admitted in evidence. It was admissible either under s. 13 or s. 11 of the Evidence Act. These questions do not, however, affect the whole of the lands to which the suit relates, and I do not see why the appeal should not have been tried as to the remainder of the land. The District Judge does not give the reasons for not doing so, and none have been presented to us. The case, therefore, must in any event be remanded for the District Judge to ascertain and fix the rents of the lands which are admittedly rent-paying.

MITTER, J.—I regret to say that, upon the question referred to the Full Bench, I cannot come to the same conclusion at which my learned colleague has arrived. It seems to me that it is no longer open to the defendant to raise the objection that a portion of the land mentioned in the notice of enchancement is his lakhiraj land. That question has been conclusively settled by a Court of competent jurisdiction in a former litigation between the parties. In that case the plaintiff obtained a decree at an enhanced rate, the defendant's plea of lakhiraj being overruled. This decree was affirmed in appeal by the District Judge. The defendant preferred a special appeal, the result of which is briefly stated in the concluding paragraph of the judgment of this Court, thus:—"The decisions of the Courts below therefore may be affirmed so far as the question of lakhiraj is

(1) 5. W. R., Act X, Rule, 3.

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concerned, the plaintiff's right to enhance this land being upheld; but as there is no evidence as to the rates, the suit to that extent must be dismissed."

Now, upon the authorities which have been referred to by my learned colleague, it is clear that, if this declaration be deemed to have been made by a Court of competent jurisdiction, the defendant is concluded by it.

This brings us to the question whether the Revenue Courts are Courts of competent jurisdiction to make a declaration like this. It has been said that Revenue Courts under Act X of 1859 cannot in any case finally decide a question of title to land. I do not think that this proposition is correct. Under Act X of 1859, the Collector's jurisdiction is limited to certain classes of suits, and it seems to me that in many of them questions of title to land directly arise. For example, when an application is made by a zemindar under s. 23 of the Act to assess alleged rent-free lands. It has been held by a Full Bench that such applications are to be deemed suits, and [the appeal from the decisions of the Collector lies to the District Judge—*Biswambhar Misser v. Ganpat Misser* (1). It is clear that questions involved in such suits are questions of title to land, and it seems to me that the Revenue Courts are competent to decide them finally. It would be unreasonable to hold that the decrees in such suits would be open to be contested again in regular Civil Courts. If that were so, the result would be that, although a judgment of a Revenue Court under s. 28 of the Act might be affirmed by this Court yet the party cast might be competent to have it set aside by a Munsif. That such judgments are final is I think expressly laid down in s. 151 of Act X of 1859, the concluding part of which says that they are not "open to revision or appeal otherwise than as expressly provided in this Act."

Similarly, it may be said of a suit for the delivery of a kabuliat, where the defendant sets up an independent title, and pleads that the land for which a kabuliat is demanded does not belong to the plaintiff but is his own land. There a question

(1) B.L. R., Sup. Vol., 5.

regarding title to land directly arises, and the Revenue Court I think in such a case is competent to decide it finally. That this is the correct law has been held in *Sonatun Roy v. Ananda Kumar Mookerjee* (1). Then again suppose a landlord issues a notice of enhancement upon a tenant, only upon the third ground mentioned in s. 17, and the tenant at once brings a suit under the provisions of s. 14 and cl. 3, s. 23, to contest his liability to enhancement, alleging that the excess lands mentioned in the notice of enhancement do not form part of his tenure held under the plaintiff, but are his lakhiraj lands. Here also a question relating to title to land directly arises, and I think for the reasons mentioned above that Revenue Courts are competent to decide it finally. Then it has been contended that this question has been set at rest by the decision of the Judicial Committee of the Privy Council in *Rhagowlee Sing v. Hossein Bux Khan* (2), and the decision of a Full Bench of this Court in *Ohunder Coomar Mundul v. Nunnee Khanum* (3). But it appears to me that neither in the one case nor in the other has it been held that a Revenue Court is not under any circumstances competent to decide finally questions of title to land. What has been decided in these cases is that the particular questions of title raised in them could not be conclusively determined by a Revenue Court.

For these reasons I am of opinion that Revenue Courts are in certain cases competent to decide finally questions of title to land.

I have next to determine whether, in the particular case before me, the decision which has been set up as a bar against the defendant's plea of lakhiraj is a decision of a competent Court. I think it is; because it is precisely the question which would have come for final determination before the Collector, if the landlord had brought a suit for assessment under s. 28, or the tenant had brought a suit under s. 14 and cl. 3, s. 2. to contest his liability to enhancement.

For these reasons I am of opinion that the decree which has been made in favor of the plaintiff in the previous suit, declaring

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(1) 2B. L. R., App., 31.

(2) 7 B. L. R., 673.

(3) 11 B. L. R., 434.

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his right to enhance these lands, is a decree of a competent Court, and according to the principle laid down in the Privy Council in *Nufferchunder Paul Chowdhry v. Poulson* (1) conclusively determines the question of liability to enhancement of the lands claimed by the defendant as his *lakhiraj*.

Baboo *Nilmadhub Sen* for the appellant.—By Act X of 1859, the Collector had jurisdiction to try and decide finally all questions of right to receive rent, and a decision so pronounced could not be questioned by a suit in a Civil Court—*Ooma Churn Dutt v. Beckwith* (2) and *Sonatum Roy v. Ananda Kumar Mookerjee* (3). It has been held by the Privy Council that the Revenue Courts are competent to pronounce such decrees—*Nufferchunder Paul Chowdhry v. Poulson* (1) *Khagowlee Sing v. Hossein Buz Khan* (4). Such decrees will bar the hearing of a second suit involving the same issue—*Mohesh Chunder Bundopadhy v. Joykishen Mookerjee* (5). The

(1) 12 B. L. R., 53.

(2) 5 W. R., Act X Rul., 3.

(3) 2 B. L. R., App., 31.

(4) 7 B. L. R., 673.

(5) *Before Mr. Justice Jackson and Mr. Justice McDonell.*

Baboo *Mohini Mohun Roy* and *Chunder Nath Bose* for the respondent.

The facts of the case appear sufficiently in the judgment of the Court, which was delivered by

The 21st July 1874.

MOHESH CHUNDER BUNDOPA-
(DHYA DEFENDANT) v. JOYKISHEN
MOOKERJEE (PLAINTIFF).*

Act VIII of 1859, s. 2—Res Judicata—Suit for Rent—Jurisdiction of Collector.

The decision of the Collector in a suit for rent of certain land is conclusive, in a subsequent suit between the same parties in a Civil Court for a declaration that the land is liable to pay rent.

Baboo *Rama Churn Banerjee* for the appellant.

JACKSON, J.—This was a suit for declaration brought by the zemindar, in which the defendant denied that he held any land in the plaintiff's talook, and also denied the plaintiff's allegation that the land which he held was mal land. The defendant set up ancestral *lakhiraj* right, and denied that he was liable to pay any rent to the plaintiff.

It came out upon the trial that there had been a previous decision between these parties in a suit for rent of previous years, and upon the whole of the evidence adduced, the *Mansif* considered that the plaintiff failed to make out his right to receive

* Special Appeal, No. 463 of 1874, against a decree of the 2nd Subordinate Judge of Zilla Hooghly, dated the 29th April 1873

law (Act X of 1859) is not changed in substance by Beng. Act VIII of 1869; the procedure only is amended, and the

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rent; in fact he decided affirmatively that the disputed land was lakiraj, and that there was no reliable evidence in support of the plaintiff's case. He therefore dismissed the suit.

This decision was appealed, and on appeal the Second Subordinate Judge on the evidence reversed the judgment of the first Court and gave plaintiff a decree.

The defendant has appealed specially here, and the first ground he has urged, and the only ground on which argument has been heard, is that which stands second in the grounds of special appeal, viz., that substantially the issue raised in the present suit between these parties having been previously raised and determined in a former suit between these parties, the plaintiff is concluded by the judgment then arrived at, and is not entitled to raise the same question in any other suit and in any other manner. That is substantially the ground taken in special appeal.

It is urged on behalf of the respondent, in the first place, that the ground had not been taken in the Courts below, and we are asked to refuse the defendant permission to allow it to be taken here. The precedent on which the special appellant relies is the case of *Mohima Chunder Mozoomdar v. Aradha Dassia* (a), in which judgment was given by me. That decision, which so far as I know is the only one in which the matter has been considered since the recent ruling of the Full Bench on the finality of decisions of the Revenue Courts, was not before the Subordinate

Judge, and certainly not before the Munsif, when the decision in this case was given. But the point is one which I think the Subordinate Judge ought to have taken up and decided for himself. We ought not therefore, by reason of this point not being taken in the lower Courts, to refuse to allow it to be taken now.

It is further contended that, supposing the point is one which ought to be allowed to be taken, the case of *Mohima Chunder Mozoomdar v. Aradha Dassia* (a) is distinguishable from the present; and Baboo Mohini Mohur Roy has argued with great force that the issue raised in the present case is not, as it was in the case of *Mohima Chunder Mozoomdar v. Aradha Dassia* (a), co-extensive and identical in the two suits,—that is to say, that the issue raised in the present suit is a wider and larger issue than that raised in the suit in which the Additional Judge of Hooghly gave decision on the 1st June 1871. It appears to me, however, that the point decided and the point for decision were essentially and absolutely the same. In that case as in the present the claim was for rent. The defence was the same, and the point decided was the same. It makes no difference that the plaintiff in the present suit asks for a declaration of his mal right to the land which the defendant occupies, because a suit for rent brought by the zemindar of a revenue-paying estate against an under-tenant assumes that the land in respect of which the rent is claimed is mal, and

1875 questions of title was binding "has been set at rest by the ruling of the Full Bench in *Chunder Coomar Mundul v. Nunnes Khanum (a)*, where it has been declared that the decision of the Revenue Court is not binding."

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Baboo *Nilmadhub Sen* in reply.

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ordinarily the same as under Act VIII of 1859. I have no doubt, however, that the Munsif was right in holding the present suit not barred, because there is a difference in the causes of action, and a bar must be made out very clearly. The purposes of the two suits are different. In the former suit the defendant wanted rent, and for the purpose of deciding that, the question of title was incidentally tried, but only for the purpose of deciding the question of rent. I have no doubt that, as a decision on title by a Revenue Court pronounced in a rent suit is binding only in the rent suit, so this decision of title, though by a Civil Court having been pronounced in a rent suit, and merely with the object of deciding as to the rent of certain years, leaves it open to plaintiffs to sue to obtain a subsequent declaration of his title." I should observe that the question really raised between these parties did not refer to any bar under s. 2 of the Civil procedure Code, but it was whether the present plaintiff, having had the issue now raised fairly tried in the Court of the Munsif and in the District Court on appeal, is entitled to raise the same question in a different form in the new suit brought for that purpose. It was lately a subject of doubt whether the previous decision upon such a point even of a Revenue Court would not be binding. That doubt has been set at rest

by the ruling of the Full Bench in *Chunder Coomar Mundul v. Nunnes Khanum (a)*, where it has been declared that the decision of the Revenue Court is not binding. It will be observed, however, that the decision of the Court in that case is shown in the words of all the Judges who gave separate judgments to have proceeded entirely upon the limited and exclusive character of the jurisdiction of the Revenue Courts. In the case before us the previous decision was not obtained in the Court of the Collector. It was a decision of the ordinary Civil Court of the Country, and although the subject-matter of that first suit was a claim for rent, it came to be cognisable under Beng. Act VIII of 1859. The Court tried that suit with all its power as a Civil Court, and had full jurisdiction to dispose finally of all questions arising before it in the course of the trial. That being so, I think the observations of the Judicial Committee in the case of *Soorjomonee Dayes v. Sudannund Mohapatrur (b)* fully apply, and that the plaintiff in this suit is not entitled to vex the defendants by raising again in a new suit the very same question which was once decided by a Court of competent jurisdiction in a previous suit. I think therefore the decisions of the Courts below should be set aside, and the plaintiff's suit dismissed with costs.

(a) 11 B. L. R., 434.

(b) 12 B. L. R., 304.

The following opinions were delivered by the Full Bench :— 1875

MACPHERSON, J. (PONTIFEX and BIRCH, JJ., concurring.)—After Beng. Act VIII of 1869 had come into force, the plaintiff brought his suit in the ordinary Civil Court seeking to recover from the defendants rent, which he claimed to be due in respect of certain lands, at enhanced rates. The defendant pleaded (amongst other objections) that a portion of the land for which rent was claimed was his lakhiraj, or rent-free land. The plaintiff relied on the decision in a previous suit instituted in the Collector's Court, under the old Rent Law, Act X of 1859, by which it was expressly determined that this land was not lakhiraj, and that the plaintiff had a right to enhance the rent ; although it was held that no decree for rent at an enhanced rate could be given in that suit, as the evidence on the question of rates was defective.

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The question referred for the decision of the Full Bench is whether the decision in the former suit in the Collectorate Court, that the land is not lakhiraj, is conclusive as regards that issue in the present suit.

The question has, in my opinion, been practically determined already by the Privy Council in the case of *Khagowlee Sing v. Hossein Bux Khan* (1), and by a Full Bench of this Court in the later case of *Chunder Coomar Mundul v. Nunnes Khanum* (2).

The point at issue in the suit in the Collectorate Court was whether the defendant was a ryot liable to pay rent and whether, if he was such a ryot, he was liable to pay rent at an enhanced rate. Probably, if the suit now before us had been instituted under Act X of 1859 in the Collector's Court, the decision in the former suit would be conclusive, the matter in issue being the same, and the Court the same. But it is clear from the decisions of the Privy Council and this Court, which I have mentioned, that, notwithstanding the decision of the Collectorate Court, a suit might have been brought in the ordinary Civil Court to establish the defendant's right to this land as lakhiraj. For the Collector's Court and the Civil

(1) 7 B. L. R., 673.

(2) 11 B. L. R., 434.

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Court were not Courts of concurrent or equal jurisdiction for the purposes of a suit to declare finally whether the land was khiraji or lakhiraj.

If the right might under the old law have been tried and adjudicated upon in a civil suit, notwithstanding the decision in the suit under Act X of 1859, then the decision of the Collectorate Court is not conclusive in the present suit. The Civil Court does not represent the Collector's Court in the present suit: that is to say, it is not because of any jurisdiction of the Collectorate Court transferred to the Civil Court that the latter has authority to deal with the suit. Therefore, it is a mistake to suppose that, if the former decision in the suit brought under Act X of 1859 would have been conclusive in a later suit brought under that Act in the Collectorate Court, it must necessarily be conclusive in the present suit, which is brought with a similar object, but in the Civil Court, under Beng. Act VIII of 1869.

The jurisdiction of the Collector's Court was not transferred by Beng. Act VIII of 1869 to the ordinary Civil Courts. S. 33 says that the jurisdiction of the Collectorate Courts in these suits is to cease, and that the suits are to be "cognizable by the Civil Courts according to their several jurisdictions." Suits under Beng. Act VIII of 1869 are ordinary civil suits in all respects, except so far as is in the Act otherwise provided. Thus any matter decided in the course of a suit under the present Rent Law, is a matter decided by an ordinary Civil Court, and not by a Court exercising a Collectorate jurisdiction transferred to it.

Being of opinion that under Act X of 1869 the decision of the Collectorate Court, as to this land not being lakhiraj, would not have been conclusive in a suit brought in a Civil Court for the purpose of having the question finally set at rest, I think that in the present suit the decision of the Collectorate Court is not conclusive.

I abstain from expressing any opinion whatever as to the circumstances under which the issue whether or not this land is lakhiraj has been raised, or as to the propriety of its being raised, at all. I confine myself to the abstract

question referred for our opinion. Something has been said of the probability of the view which I take leading to a revival of disputes, which have been supposed to have been set at rest by decisions passed under Act X of 1859. But I see no reason to think it probable that the present expression of my opinion will have any such effect. The Full Bench case to which I have referred was disposed of more than two years ago; and there has been as yet no indication of any such evil consequences, as are suggested, having been caused by it.

It is only with regard to matters decided in suits under Act X of 1859 that the question which is the subject of this reference can arise. For under Beng. Act VIII of 1869, the decision of the Civil Court in a suit for rent, as in any other kind of suit, will no doubt be conclusive in any subsequent suit between the same parties.

While I am of opinion that, in the case before us, the decision under Act X of 1859 is not conclusive, I would add that it clearly is evidence, and that the Civil Court is of course bound to give weight to the decision of the Collector's Court.

The case will be sent back to the Bench which referred the question.

MORRIS, J.—I concur with the Chief Justice in the answer which he proposes to give to this reference, on this ground, that it is sufficiently established by the decision of Sir Barnes Peacock, in the case of *Mussamat Edun v. Mussamat Bechun* (1), and by that of a Full Bench of this Court in the case of *Chunder Coomar Mundul v. Nunnee Khanum* (2), that, for the final determination of an issue raised in a rent suit in the Court of the Collector, under Act X of 1859, affecting the validity of a title set up by one of the parties, the decision of the Collector is not that of a Court of competent jurisdiction. The current of decisions of this Court seems to me to be in the same sense; and I think, therefore, that the present matter is hardly any longer open to question. I would add that if, under the old Rent Law, a question of title, after having been once adjudicated

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(1) 8 W. R., 175.

(2) 11 B. L. R., 434.

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upon by a Collector, could, as it certainly could, be again raised and tried by a Civil Court, within a period of twelve years from the date of the cause of action, then, by the passing of Beng. Act VIII of 1869, persons, whose rights have been in issue, and in a sense determined by the Court of a Collector under Act X of 1859, would be deprived of a remedy and privilege which they would otherwise have possessed ; but I cannot gather from the Act that such deprivation was within the contemplation of the Legislature.

JACKSON, J.—The plaintiff had brought a previous suit in the Court of the Collector against the defendant to recover an arrear of rent at enhanced rates after notice. The defendant in that suit had averred that part of the land held by him was lakhiraj. He denied the service of notice, and also denied that the rates were proper rates. The final result of that suit was that the High Court on special appeal affirmed the finding of the Court below against the lakhiraj title set up by the defendant, also affirmed the finding that notice had been duly served, but held that no evidence had been given on which the rates could be determined. The High Court therefore, upholding the decision in other respects, dismissed the suit in so far as the question of rate at which the rent was to be enhanced was concerned.

The plaintiff now filed a fresh plaint reciting a new notice and asking for a decree in respect of a further arrear at the rates previously alleged, and Beng. Act VIII of 1869 having intermediately come into force, the new suit was commenced in the Court of the Munsif. The defendant now set up precisely the same pleas as before, and also pleaded s. 2, Code of Civil Procedure, in bar of the suit, dishonestly alleging that the first suit had been dismissed *in toto*. On this occasion the rates were ascertained on a local inquiry by the Civil Court Ameen, service of notice having been proved, the plea of lakhiraj was held to be rebutted by the former decision as well as by the other evidence adduced by plaintiff, and the Munsif gave judgment for very nearly the rent demanded. On appeal to the District Court further proof was called for as to the notice. This being

finally established, the Judge proceeded to consider the plea of lakhiraj, and on this point holding the previous decision between the parties to be a "mere expression of opinion" which could not bind the defendant, and declaring the other evidence offered by plaintiff to be of no value, he concluded by saying:—"Under these circumstances I do not think that the Court is bound to go into the evidence as regards the land admitted to be rent-paying land." And he oddly enough wholly set aside the judgment of the Court below. The case having come here on special appeal, the question is now raised whether the decision in the previous rent suit on the plea of lakhiraj binds the parties.

The learned Judges who have referred this question to a Full Bench are not agreed in opinion. Markby, J., holds, as the result of two leading cases, one *Khagowlee Sing v. Hossein Bux Khan* (1), before the Judicial Committee of the Privy Council, and the other *Chander Koomar Mundal v. Nunnies Khanum* (2), before a Full Bench of this Court, "questions of title cannot be determined finally in the Revenue Courts;" but admitting that the decision of Morgan and Pundit, JJ., in *Ooma Churn Dutt v. Beckwith* (3), is authority for holding that the Collector had jurisdiction finally to determine the right to recover rent, he refers this question to the Full Bench, because that decision has never been expressly overruled. Mitter, J., is of opinion that the leading cases referred to only decided that the particular questions of title raised in them could not be conclusively determined by a Revenue Court. He holds that there are questions of title which a Revenue Court is competent to determine conclusively, and that the question raised in the present suit is one of them, and he is therefore of opinion that the previous decision binds the defendant.

Now I fully agree with Markby, J., that, apart from the decision in *Khagowlee Sing v. Hossein Bux Khan* (1) and the subsequent ruling of the Full Bench, upon the mere consideration,

(1) 7 B. L. R., 673.

(2) 11 B. L. R., 434.

(3) 5 W. R., Act X Rul, 3.

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that is to say, of the language of Act X of 1859, there is little, if any thing, to suggest the conclusion that Revenue Courts could not pronounce binding decisions as to title where such decisions were necessary for the purposes of the separate jurisdiction confided to them.

Let us consider for a moment what the mofussil Courts of this country are. They are emphatically a branch of the executive (a system not yet a century old): they have been frequently made and unmade: their boundaries of jurisdiction have been repeatedly altered and unsettled: and regard being had to the sources from which their Judges are taken, there seems to be no reason which should determine the forum of any trial except administrative convenience. And accordingly with a view, as it was supposed, to the more commodious and just adjudication of various kinds of controversies, the Civil Courts were appointed by Act VIII of 1859 to take cognizance of all suits of a civil nature, with the exception of suits of which their cognizance is barred, &c. And by Act X of the same year, passed a month later, it was provided in s. 23 and others that certain suits therein specified should be cognizable by the Collectors of land revenue, and should not be cognizable in any other Court, or by any other officer, or in any other manner than under the provisions of that Act. These two enactments were under the consideration of the Legislature at the same time, and were long and carefully considered, and the result of them taken together, as it seems to me, was a great division of the subjects of litigation, whereby one branch was assigned to the Courts of Collectors and Deputy Collectors, and the remainder (till a further subdivision afterwards took place) was left with the Courts of Civil Judicature. The Judicial Committee of the Privy Council, in the case of *Khagowlee Sing v. Hossein Bux Khan* (1), say of the Collector:—"His decision was not that of a Court competent to adjudicate on a question of title. He had only a special jurisdiction to try summary suits for the recovery of rent." But on this point with all respect I must say their Lordships appear to have been misinformed. If that was

(1) 7 B. L. R., 679.

the nature and the limit of the Collector's jurisdiction, why does s. 153 of the Act specially allow appeals against his judgments, although the value be less than Rs. 100? I cite this section at present merely for the purpose of showing that the Legislature recognized and provided for the case of Collector's determining questions relating to title, and deprived such decisions of necessary finality by allowing an appeal without reference to value. If the Collectors had been incompetent to determine such questions, it would certainly have been provided that the determination, if made, should be void, or that it might be set aside by the Civil Court. But in fact by s. 151 no judgment of a Collector in any suit is to be open to revision or appeal otherwise than as expressly provided in the Act. No one indeed can look through the sections conferring jurisdiction on the Collectors without perceiving that the necessity for adjudicating on questions of title must have constantly arisen in his Court.

The truth is, that the case of *Khagowlee Sing v. Hossein Bux Khan* (1) bristled with reasons why the Collector's decision should not have concluded the parties, and the observations of their Lordships on the different reasons are so mixed up as to afford the appearance of allowing the same weight to one as to another, and the expressions I have quoted, which would have correctly enough described the powers of a Collector under Regulation VII of 1799, are manifestly not correct as applied to the Collector of Act X of 1859.

I will now advert to the Full Bench case of *Chunder Coomar Mundul v. Nunnee Khanum* (2). The nature of that case was plain enough. Backer Ali, a tenant, brought a suit of the simplest kind against his landlord, namely, a suit under cl. 6, s. 23, Act X of 1859, to recover possession of his tenure from which he had been illegally ejected. He alleged himself to have been holding under a maurasi potta which he filed, and which the landlord at once impugned as false. The Collector might perhaps have altogether avoided any decision as to the potta, but he did inquire into it and found it to be genuine; and finding also that Backer had been illegally ejected, the Collector restored him to possession.

(1) 7 B. L. R., 673.

(2) 11 B. L. R., 434.

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The second suit, in which this decree was set up as conclusive evidence, was brought against the heirs of Backer Ali by the zemindar, who alleged amongst other things that Backer Ali's right to hold possession of the land had ended with his life, and the suit was for ejectment of the heirs. Now I think it plain here that the question sought to be raised in the civil suit was different from, as well as wider than, that which had been before the Collector, and the attempt to employ the previous judgment on such an occasion quite deservedly failed. Considering that it had not been imperative upon the Collector in this case, which was really a summary case, to give any final opinion at all upon the potta, I clearly saw the inconvenience and indeed the impropriety in such a case of allowing the plaintiff's mouth to be stopped by setting up the superfluous decision. But the case being of that nature, and the occasion not being fit for a discussion of how far a Collector's decision really could be final on such questions, and my mind not being at all made up upon the matter, I simply assented to the conclusion of the majority; and in a similar case I should probably adhere to that opinion.

But the case before us now, as will appear from the statement with which I began, is very different; and I feel that, if I held it to be governed by the decision in *Chunder Coomar Mundul's* case (1), I should be going beyond what the Full Bench decided in whatever terms the decision may have been expressed, and that I should be assenting to a principle, to which all the reflection which I have given to the case has failed to reconcile me. Here the suit is by the same party; the subject of the suit is precisely analogous—it would be identical, but that the rent of a different year is in question;—the same plea is raised on a precisely similar occasion by the same party and in the same manner. The plaintiff might reasonably have supposed as the result of the previous trial that he had got a long way towards enhancement, one question of right and one of form having been decided in his favor, and the fruits of the decision being lost merely in respect of the rents of the particular year by reason

(1) 11 B. L. R., 434.

of his failure to prove the rates. No one will contend but that if the second suit had been brought in the same Collector's Court, that Collector must have given effect to his own previous judgment, and on proof of the rates and of the notice must have given the plaintiff his decree. But in the meantime Act VIII of 1869 is passed by the Bengal Council, and the suggestion is that, as the plaintiff has been obliged to bring his suit in a Court possessing a wider jurisdiction, therefore that Court, which is only trying the suit which but for Act VIII the Collector would have tried, is at liberty to ignore the previous judgment, and decide for itself on the same evidence. But it may be doubted whether wider jurisdiction is a term properly applicable here; for if I have correctly stated the effect of Act VIII and Act X of 1859 passed almost at the same moment, then the result of the passing of the Beng. Act VIII of 1869 may have been to give the Civil Courts their old jurisdiction plus that of the Collectors, and this may possibly account for the introduction, otherwise difficult to understand, of the direction given in s. 42 that suits under the Act shall be entered in a separate register.

This notion may not be in precise accord with what I said in *Jallalooddeen v. Burne* (1), but the question is so little one of

(1) *Before Mr. Justice Jackson and Mr. Justice Ainslie.*

The 13th May 1872.

JALLALOODDEN (PLAINTIFF) *v.*
J. BURNE, MANAGER, COURT OF
WARDS, DARBHANGA (DEFENDANT).*

*Act VIII of 1859—Beng. Act VIII of
1869—Jurisdiction—Rent.*

The defendant took from the plaintiff's ancestor a small portion of endowed land for a garden, and in consideration thereof paid him a certain fixed amount of grain for his maintenance and support, and subsequently that payment was

commuted into a monthly allowance of Rs. 3-8, which was regularly paid till 1876, and then stopped. To a suit under Beng. Act VIII of 1869, to recover the amount, the defence was that a suit for a claim of such a nature could not be brought under that Act, but the objection was overruled, and the plaintiff held entitled to recover the amount sued for.

THE Maharaja of Darbhanga, who was at that time Maharaja Chutter Singh Bahadur, having occasion for one biga two katas of land, part of an endowment held by the plaintiff's ancestor, on which land the Maharaja desired to make a garden, took and occupied it, and in consideration

Special appeal, No. 1390 of 1871, against a decree of the additional Judge of Zilla Tirhoot, dated the 7th September 1871, reversing a decree of the Munsif of that district, dated the 15th June 1871.

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principle, and belongs so much to the domain of conjecture, that one may be well excused for slightly altering his opinion upon of such occupancy paid in the first lower Appellate Court so flimsy a defence should have been allowed to prevail, and also that it should have been urged here on behalf of the Court of Wards.

The plaintiff sued in the Munsiff's Court to recover the same. The question was raised whether the suit was a suit for rent or for an allowance in the nature of charity, and consequently whether it was a suit under Beng. Act VIII of 1869 or no.

The Munsiff, considering the suit to be really a suit for rent, and finding that the amount was actually due to plaintiff, gave him a decree, save only for a small portion of the claim, namely the allowance for one month previously paid, which the plaintiff had by some mistake included in his claim.

On appeal to the Additional Judge, it was chiefly urged that the suit could not be looked upon as a rent suit. The Judge held that it was not, and consequently could not be brought under Beng. Act VIII of 1869, and he ordered it to be struck off the file of cases under the Act.

The plaintiff then preferred the present appeal to the High Court.

Monshee Mahomed Yusoof for the appellant.

Baboo Unoda Persad Banerjee for the respondent.

The judgment of the Court was delivered by

JACKSON, J. (who, after stating the facts and reading the judgment of the Subordinate Judge, continued):— I very much lament that in the

The Maharaja for his own purposes wanted the plaintiff's land. The plaintiff's ancestor agreeing to give the land, which apparently he could not alienate, the Maharaja, as a sop for his own vanity, fixes probably a larger allowance than usual to be paid, and in consideration of this, the owner of the land acquiesces in its being called "charity" instead of rent. This amount continues to be paid for a number of years till the occupier or lessee suddenly thinks fit to stop it, and the question is raised whether this amount was charity or rent. It is in fact the consideration stipulated to be paid for the defendant's occupation of the land. The circumstance of the plaintiff's ancestor having been a fakir in no respect affects the plaintiff's right to recover the equivalent so agreed upon, by whatever name it be called. The question whether the suit is one under Beng. Act VIII of 1869 or not appears to be of the most frivolous character.

The Bengal Legislature, when it Passed Act VIII of 1869, restoring to the Civil Courts the jurisdiction of which they had been for a time deprived, and empowering them to try suits for rent and others of a kindred nature, thought fit to direct that the suits instituted under the provisions of the Act should be entered in a separate register. This provision, however, was introduced obviously for statistical purposes, and not for the purposes of separating into parts the jurisdiction exercised by one Court.

it on further consideration—and in fact the system founded upon these two Acts never had time to be consolidated and made certain. The Courts were long occupied in efforts to make it work harmoniously ; and before it had existed quite ten years, it was swept away.

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But it may be said the evil will not go far, for the decision which the parties may now obtain will be final and conclusive : but the plaintiff may fairly object to being told that finality steps in just at the point where he has been defeated.

It is not represented that in this instance the defendant was at any particular disadvantage before the Collector, nor did he seek the aid of the Civil Court while it was yet distinct, for the purpose of obtaining any declaration as to his lakhiraj title. He so far acquiesced in the adverse result ; and it is proposed now to give the effect of a successful resort to the Civil Court to a merely repeated defence with a dishonest averment superadded.

It seems to be supposed that injustice will follow from having parties bound by the decisions of the Revenue Courts, but seeing that in general precisely the same appeal was provided in these cases as from decisions of the Civil Courts, I cannot see much ground for apprehension.

But this I do see plainly that, if the transfer of rent suits to the Civil Courts is to be held as affording an opportunity for re-opening every question of title or quasi-title that has been supposed to be set at rest by Collector's decisions, there will be many thousands of controversies set loose, and serious confusion will ensue.

My opinion is that a decision in a previous and similar suit upon an issue raised substantially in the same manner, by parties in a Revenue Court, is binding upon them as evidence in a subsequent suit which but for the passing of Beng. Act VIII of 1869 would also have been brought in a Revenue Court.

I cannot conceive how the plaintiff's of action, even supposing that the suit allegation that the suit was brought was not really a rent suit under Beng. Act VIII of 1869 should render it liable to be struck off in order that he might bring a fresh suit and we therefore set aside the suit under Act VIII of 1869 in decree of the lower Appellate Court the same Court and on the same cause and restore that of the Munsif.

APPELLATE CIVIL.

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March 13.

Before Mr. Justice Phear and Mr. Justice Morris.

MUDDUN GOPAL LALL (DEFENDANT) v. MUSSAMUT GOWRUN-
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GRIDHARI LALL SAHOO (DEFENDANT) v. MUSSAMUT GOWRUN-
BUTTY AND OTHERS (PLAINTIFFS).*

POOSUN LALL SAHOO (DEFENDANT) v. MUSSAMUT GOWRUN-
BUTTY AND OTHERS (PLAINTIFFS).*

*Hindu Law—Mitakshara—Son's interest in the Ancestral Estate, Alienation
by Father.*

The interest which a son by birth acquires in the ancestral estate of his father under the Mitakshara law does not entitle him to claim exemption from all debts contracted by the father subsequent to his birth. Such exemption can only be claimed when the debts are of an illegal nature or have been contracted for immoral purposes.

An alienation made by the father by way of mortgage or sale for the discharge of a debt for which the property would be ultimately liable, falls within the meaning of the unavoidable transactions spoken of in paras. 28 and 29, s. 1, Ch. i of the Mitakshara.

The facts of this case, so far as they are material to this report, were as follows:—The two principal plaintiffs (who sued by their mother and guardian Mussamut Gowrunbutty, and who are hereinafter styled the plaintiffs) were the minor sons of one Ship Narain Singh, and formed, with their father and their eldest brother Amur Persad, who had attained his majority, a joint Hindu family subject to the Mitakshara. The suit was brought against Shib Narain Amur Persad, and certain persons, who claimed interests in the ancestral estate of the joint family under bonds, or as purchasers in execution of decrees obtained on bonds, which the plaintiffs alleged Shib Narain had illegally given to secure repayment of moneys unnecessarily borrowed by him for his own purposes; and the plaintiffs prayed for a

* Regular Appeals, Nos. 11, 32, and 49 of 1873, against a decree of the 1st Subordinate Judge of Zilla Bhagalpore, dated the 27th September 1872.

partition of the ancestral estate and for possession of their shares free from encumbrances by the cancelment of the bonds. They alleged that amongst others to whom Shib Narain had given such bonds were the three defendants who were respectively the appellants in these three appeals, and they went on to state that these defendants, "with the view to make their own and plaintiffs' father's illegal act binding on Amur Persad Singh, caused the latter, in connexion with Baboo Shib Narain Singh to execute fresh bonds, sought to be set aside, for the amount involved in the former bonds."

These three defendants filed separate written statements, but all of them alleged that Duryao Singh, the father of Shib Narain, and the plaintiffs' grandfather, had in his lifetime incurred large debts, for repayment of which after Duryao Singh's death, as well as for moneys required for the expenses of the zemindari and joint family and for certain marriage and obsequial ceremonies, Shib Narain borrowed money from various bankers and amongst others from the defendants, and that Shib Narain and Amur Persad were in possession of the property in their own absolute right. Muddon Gopal Lall further stated that, confiding in these circumstances, he advanced to Shib Narain and Amur Persad "Rs. 3,000 on interest by hypothecation of 8 annas share of Mauza Beer, asli with dakhili," and obtained from them a registered bond dated 26th Kartik 1278 F.S. (4th November 1870). Gridhari Lall Sahoo and Poosun Lall Sahoo each stated that Shib Narain and Amur Persad had given them registered bonds for the amounts advanced by them respectively, that they had obtained decrees on those bonds, and that, when they proceeded to execute the decrees by sale of the property of Shib Narain and Amur Persad, the latter to preserve their property from sale executed in good faith the bonds sought to be set aside, by which they hypothecated 8 annas share of the property.

The Subordinate Judge framed various issues, but neglected to frame any issue as to the right of the defendants to have a valid charge upon the whole estate which the plaintiffs sought to divide, and various interlocutory orders made by him in the course of the proceedings gave rise to an impression on the

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1874 part of the defendants that there was no necessity for them to prove the affirmative of this issue or to give evidence in support of the particulars of their claims, and consequently they did not adduce the necessary evidence.

The Subordinate Judge held that the plaintiffs had an equal right with their father in the ancestral property, and that their right to have a division of their shares neither depended upon his consent, nor was it contingent upon his depravity. He further held that, though the plaintiffs could not ask for a cancellation of the deeds executed by their father and their elder brother, they were entitled to a declaration that the sales and mortgages effected by them did not bind the plaintiff's shares in the joint estate. He accordingly gave the plaintiffs a decree in respect of a moiety of the ancestral estate to hold possession thereof free from all debts, mortgages, and sales effected by the first and second defendants.

From this decision the defendants Gridhari Lall Sahoo, Poonun Lall Sahoo, and Lalla Muddun Gopal appealed separately. The cases came on for hearing before Phear and Morris, JJ., on the 7th and 14th of January 1874, who remanded them in order that evidence might be taken upon the issue above stated.

On remand, the defendants gave evidence to support their contention that the debts were contracted, and the sales made for the purposes of the joint family; that the plaintiffs' grandfather died heavily in debt; and that the plaintiffs' father, the first defendant, was not extravagant.

The case was then returned to the High Court, and it came on for hearing before Phear and Morris, JJ., on the 13th of March 1875.

Mr. C. Gregory, Mr. Sandel and Baboo Chunder Madhub Ghose for the appellants.

Baboo Mohini Mohun Roy and Bashbehari Ghose for the respondents.

Baboo Chunder Madhub Ghose, on behalf of the appellants, relied on paras. 28 and 29, s. 1, Ch. i of the Mitakshara, and

the case of *Hunoomanpersaud Panday v. Mussamut Babooe Munraj Koeres* (1) to support his contention that the mortgages created by the father, the first defendant, bound the entire joint property.

Mr. Gregory on the same side.

Baboo *Mohini Mohun Roy* and *Rashbehari Ghose*, on the authority of *Mahabeer Persad v. Ramyad Singh* (2), contended that the encumbrances did not bind the shares of the minor plaintiffs. As to the question of partition, it has been already decided that a son, under the Mitakshara law, may sue during the lifetime of his father for a division of the ancestral property—*Laljeet Singh v. Rajcoomar Singh* (3).

Baboo *Chunder Madhub Ghose* in reply.

The judgment of the Court was delivered by

PHEAR, J.—The principal question which is now before us is, whether or not the evidence taken at the original hearing, together with that taken on remand, serves to establish, as against the plaintiffs, the encumbrances which the appellants, Gridhari Lall Sahoo, Poosun Lall Sahoo, and Muddun Gopal Lall, respectively claim to have upon the property the subject of this partition suit.

It appears to be admitted that Shib Narain Singh, the first defendant, and his elder son, the second defendant, and his younger sons the minors, plaintiffs, together constitute a joint family living in commensality under the Mitakshara law, and in the joint enjoyment of the property which is the subject of suit.

The way in which Gridhari Lall places his claim is shortly as follows:—He says that Duryao Singh, the father of Shib Narain, and therefore the grandfather of the plaintiffs, during his life incurred great pecuniary liabilities, and that on his death the duty of discharging his debts fell upon Shib Narain. In

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(1) 6 Moore's I. A., 393.

(2) 12 B. L. R., 90.

(3) 12 B. L. R., 373.

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addition to this, Shib Narain himself wanted money to carry on the zemindari and domestic business, and to perform certain marriage and obsequial ceremonies, and so from time to time borrowed money from various bankers, among others the appellant's firm; that Shib Narain and his son Amur Persad were in possession of the disputed property in their own absolute right; and the banking transactions just referred to had been carried on with the appellant's firm continuously since the days even of Duryao; and that relying on these circumstances, the appellants, when Shib Narain and Amur Persad were pressed by zemindari and domestic needs, lent them money, and they secured repayment of the same by the execution of two registered bonds, one after the other, in favor of the appellant. Gridhari Lall adds that having sued on these bonds, he obtained two decrees dated respectively 4th May and 14th June 1870, and when in execution of these decrees he had seized and was about to sell the property of Shib Narain and Amur Persad, they, with the view to preserve the property from sale, executed in good faith a bond, dated 9th July 1870, hypothecating 8 annas share of Mauza Beer for the sum remaining due, namely, Rs. 6,794.

The evidence in support of this case is extremely slight. The bond itself of the 9th July 1870 is proved, though perhaps proof of it was not needed in view of the plaint. Also the decrees of 4th May and 14th June 1870 may be considered to be proved. But although Gridhari himself and several witnesses have been examined on the remand order, they speak very imperfectly indeed to the other material facts of this story. Gridhari does however explain the reason why only 8 annas of the property was pledged to him by stating that the other 8 annas had in his presence been sold by Shib Narain and Amur Persad to Sitaram, one of the defendants, in the preceding month of May, namely on 8th May 1870, for R. 86,000.

The case of Poosun Lall is precisely the same as that of Gridhari Lall, and is stated in almost exactly the same words: the only difference between the two cases is that Poosun Lall's final bond of hypothecation was for Rs. 5,874 instead of Rs. 6,794.

The evidence which has been given on behalf of this defendant even after remand, if taken alone, altogether fails to establish this case; the bond itself is not proved. It may however be taken (although against minors) as admitted by the plaintiff: and the facts established in Gridhari Lall's case can be made use of by this defendant.

Muddun Gopal reiterates the story of the other two appellants as regards the debts left by Duryao Singh and the expenditure of Shib Narain, and that Shib Narain Singh and Amur Persad were in possession of the disputed property in their own absolute right; and then he says that, confiding in these circumstances, he advanced to Shib Narain and Amur Persad the sum of Rs. 3,000 on interest by hypothecation of 8 annas share of Mauza Beer, asli with dakhili, under a registered bond dated the 26th Kartik 1278 F.S. (4th November 1870).

This bond is sufficiently proved, as also the advance of the money thereunder, and it may also be taken as made out that the money was wanted, or at least that Muddun Gopal *bonâ fide* believed it was wanted, for the performance of a family ceremony.

With regard to all three appellants, it may be reckoned as certain from their written statements and from the evidence that they knew the joint family consisted of more members than Shib Narain and Amur Persad, but they advanced money to and dealt with Shib Narain and Amur Persad as being the only adult members of the family; and they were ultimately content to take such security for repayment of the money as Shib Narain and Amur Persad alone could give them in the shape of a mortgage or charge upon the family property.

Consequently, the three cases may be summarized thus:—In that of Muddun Gopal, the plaintiff's father and elder brother mortgaged 8 annas of the joint property to Muddun Gopal in consideration of a loan of money which was wanted for a family purpose.

In those of Gridhari Lall and Poosun Lall, putting them at their highest, the plaintiff's father and elder brother mortgaged 8 annas of the joint property in order to prevent the sale of that property at the instance of Gridhari Lall and Poosun Lall in

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execution of decrees which those persons had respectively obtained against the father and eldest son personally.

The plaintiff's case then is reduced to this, namely, are the minor sons, the plaintiffs, entitled to insist on partition of the joint property, and to obtain their share of the joint property free of these mortgages.

In the case of *Laljeet Singh v. Rajcoomar Singh* (1), we had occasion to discuss the first part of this question at considerable length. The result at which we arrived was that the sons could at any time during their father's life, call upon him to partition the ancestral property. And as to the second part of the question, it was also made clear in the course of the discussion that under the Mitakshara law the occurrence of the birth of a son had the effect of limiting the father's power of disposition over ancestral property: while he could before the birth of a son deal with it as sole owner, after that event he becomes in a certain sense subject to the control of his son, who by birth becomes co-owner with him; with this further condition however that, during the minority of his son, he has an absolute discretion within certain limits.

Those limits are prescribed in paras. 28 and 29 of s. 1, Ch. i, Mitakshara. They are expressed no doubt in these paragraphs in somewhat general terms, and this Court is constantly called upon to decide whether a given case comes within them or not. The judgment of the Privy Council in *Hunoomanpersaud Panday v. Mussamut Babooee Munraj Kooree* (2) has been applied by analogy and considered to furnish a guiding principle upon this point. Since however the present appeal first came before this Court, a decision has been passed by the privy Council in the case of *Girdharee Lall v. Kantoo Lall* (3), which is even more immediately relevant.

According to that decision, as we understand it, the interest which, under the Mitakshara law, a son acquires in the ancestral property of his father, by and in the event of being born, is of the nature of an inheritance; and remains liable to the payment

(1) 12 B. L. R., 373.

(2) 6 Moore's I. A., 339.

(3) 14 B. L. R., 187.

of the personal debts of the father, even though subsequently contracted, in the same way as the entire property would have been liable had the son not been born, except only in the case where those debts are illegal, or were contracted for an immoral purpose. The judgment says expressly "the interest of the sons as well as the interest of the fathers in the property, although it is ancestral, is liable for the payment of the fathers' debts."

It would therefore seem to follow that any disposition of the property, which is reasonably made by the father for the purpose of discharging a debt of this kind, i.e., a debt of the father's which does not fall within the exception, is one of those spoken of and authorised as "unavoidable" by paras. 28 and 29, s. 1, Ch. i, Mitakshara.

The debt being of such a nature that the property is ultimately liable to discharge it, the alienation of that property, whether by mortgage or sale by the father upon reasonable terms for the purpose of discharging the debt, must be substantially an unavoidable transaction.

In the present case as the evidence stands, meagre though it is, the father's debts for which this property has been hypothe- cated in favor of the defendants do not appear to have been illegal or of an immoral character.

In the case of Muddun Gopal, the debt was incurred for a family purpose ; and in the other two cases, they were debts the reality of which has, so to speak, been guaranteed by a decree. It must be taken as long as those decrees or unimpeached that there really was a debt from the father and his eldest son to Pootsun Lall and Gridhari Lall respectively. The debts then being apparently real debts, and not of an immoral character, and one of them being incurred for a family purpose, it follows that they were of such a nature that the joint property of the family was liable to meet them; and that, therefore, the mortgages which the father has made for the purpose of securing these debts to the defendants, appear upon the authorities which have been quoted to be good encumbrances upon the joint estate, and valid against the claims of the minors, the plaintiffs.

We thus think that, while the plaintiffs are no doubt entitled

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to have a partition of the property, the partition must be subject to the mortgages of the three appellants to the extent of 8 annas of the entire property.

The appellants are entitled to their costs: but, as we cannot give a decree making the minors pay the costs, these costs will be declared a charge upon the property.

Appeals allowed.

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MUSSAMUT
GOWRUN-
BUTTY.

Before Mr. Justice Macpherson, Officiating Chief Justice, Mr. Justice Jackson, Mr. Justice Pontifex, Mr. Justice Birch, and Mr. Justice Morris.

JAGABNATH SINGH (ONE OF THE DEFENDANTS) v. SHEWRATAN SINGH AND ANOTHER (PLAINTIFFS).*

1875
May 19.

Limitation—Appeal—Act IX of 1871, s. 13—Act VIII of 1859, s. 333

In computing the period of limitation prescribed for an appeal by s. 13 of Act IX of 1871 the time from which the period must be taken to run is the date of the decree appealed against: and the days which under that section may be excluded are only the days requisite for obtaining a copy of the decree.

But if in any case it is impossible for the appellant to obtain a copy of the decree, or to obtain a copy of the judgment, in time, the Court, if satisfied that the appellant is not to blame, may consider that there is sufficient cause within the meaning of s. 5, cl. b of Act IX of 1871, and may, on an application, admit the appeal after the period of limitation prescribed by the Act.

On this appeal being presented to be filed, it was sent up for orders by the Deputy Registrar with the following remarks:—

“This appeal is within time if a deduction be allowed of the period taken up in obtaining a copy of the judgment as it used to be before the new Limitation Law (Act IX of 1871) came into operation, the Court having then held in *Hossanee Begum v. Dumree Maktoon* (1) that the term ‘decree’ in s. 333, Act VIII of 1859, included ‘judgment.’

*Special Appeal No. 1201 of 1875, from the Judicial Commissioner of Chota Nagpore, dated 2nd October 1874.

"The 5th Bench has, however, since decided in *Horil Pattuck* 1875
v. Bhowaneram (1) that, with reference to s. 13 of the new JAGANNATH
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(1) *Before Mr. Justice Markby and*
Mr. Justice Birch.

The 9th March 1874.

HORIL PATTUCK (PLAINTIFF) v.
BHOWANERAM AND OTHERS (DE-
FENDANTS).*

Limitation—Appeal—Act IX of 1871,
s. 13.

In computing the period of ninety days under s. 13 of Act IX of 1871 for filing an appeal, the appellant is, as a matter of right, entitled to deduct the number of days required for taking a copy of the decree only. The word 'decree' in that section does not include the 'judgment.'

Under the circumstances, however, the Court admitted the appeal although presented after time.

Baboo Anand Chunder Ghosal for the appellant.

The facts of this case are sufficiently set out in the judgment of the Court, which was delivered by

MARKBY, J.—In this case the judgment was delivered in the Court below on the 16th of September 1873. On the 1st of November the appellant asked for a copy of the judgment and decree. The judgment was delivered to him on the 24th, and the decree on the 19th. On the 7th of January he filed his appeal in this Court, and it was returned to him as being too late. An application is now made to us to admit the appeal.

The appellant contends that he is within time. From the 16th September to the 7th of January is one hundred and thirteen days. The law (Act of 1871 IX, s. 13 and Sched i, art. 168) says—that the time allowed for filing an appeal is ninety days from

the date of the decree appealed against; but that in computing the period of limitation the day on which judgment was pronounced and the time required for obtaining a copy of the decree, sentence, or order appealed against shall be excluded. Excluding the time occupied in obtaining copy of this decree,—namely, eighteen days,—the appellant would still be too late. The appellant, however, contends that the time required for obtaining a copy of the judgment is also to be excluded; and he argues that in the above provision of the law the word 'decree' includes the 'judgment' also. Considering that the word 'judgment' is used in the very same section as distinguished from 'decree,' I can hardly think this to be the case. The words 'judgment' and 'decree' are not generally used in the Code in the same signification, and when both are intended, both are expressed, as, for example, in s. 198. Nor do I think the sense of the section requires this construction. I think the main object of the section was to provide for any delay there might be in drawing up the decree after the judgment was pronounced, the exact form of a decree being often a matter of consideration and discussion after the judgment has been pronounced.

Of course if there were such delay that the appellant could not comply with the requirements of art. 163 he would have good ground for claiming the indulgence of the Court, but I do not think that, as a matter of right, he can claim to deduct more than the time required for obtaining a copy of the decree.

*Application for admission of special appeal.

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Limitation Law, the term 'decree,' used in s. 333 of Act VIII of 1859, does not include the 'judgment;' and that the appellant cannot, as a matter of right, claim to deduct more than the time required for obtaining a copy of the decree."

The case was heard before Glover and Mitter, 'JJ., who, in consequence of the conflicting decisions, referred it to a Full Bench.

Baboo Taruck Nath Sen for the appellant.—The Act of 1871 has not altered the law upon the subject. There is no material difference between s. 13 of Act IX of 1871 and s. 333 of Act VIII of 1859. The filing of a copy of the judgment is as necessary now as before, and the judgment must be filed just as much as the decree, therefore the time required for the one should be deducted as much as that for the other. Great injustice may result from a delay in the office of the Court that passed the judgment in giving the appellant a copy of the judgment. By Act IX of 1871, Sched. i, art. 163, ninety days are allowed from the date of the decree appealed against. This must be taken with s. 372 of Act VIII of 1859, which allows an appeal from a "decision." There

There is, however, a case—*Harrah Sing v. Tulsi Ram Sahu* (a)—in which it is said that the Division Bench held the contrary upon s. 333 of the Code of Civil Procedure, which, though it is as to this matter now repealed, is merely in the same words as the substituted provision of the Limitation Act of 1871. I have some doubt whether that case quite correctly states the opinions of the learned Judges who decided it, nor is the practice of this Court on the Original Side, as far as I can ascertain, such as is there stated. The practice on the Original Side is, I am informed, not to enlarge the time to enable the party to obtain a copy of the judgment, as it is supposed that counsel will attend

and ascertain the contents of the judgment when it is delivered. By s. 183 of the Code all Judges are required to pronounce their judgments in open Court after having given due notice to the parties or their pleaders, and therefore the same opportunity exists (unless Judges entirely neglect their duty) in the mofussil as here of obtaining information upon what points the judgment turns.

As, however, it appears that there has been a practice in the office of excluding the time required for obtaining both judgment and decree it is possible that the appellant has been in this case misled, and therefore, under cl. b of s. 5, I think this appeal may be admitted.

is no separate period of limitation for this : therefore "decree" and "decision" are used as meaning the same thing. Hence the "decree" in s. 333 has been held to include the "decision," and this has been the practice of the Court.—*Hossanee Begum v. Dumree Mathoon* (1). It is very doubtful that the Court would have the power to prevent any injustice arising from the neglect of others, if any other construction were to be put upon the Act.

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The opinion of the Full Bench was delivered by

MACPHERSON, J.—We are of opinion that the decision of Markby and Birch, JJ., in *Horil Pattuck v. Bhowaneeram* (2) is right, and that the Limitation Act must be construed strictly as meaning that which it says,—namely, that the time from which the period of limitation begins to run is the date of the decree appealed against, and that the days which under s. 13 of that Act may be excluded are only the days requisite for obtaining a copy of the decree.

As a general rule, there can be no doubt that the time which suffices for obtaining the decree will also be sufficient for obtaining the judgment. But if in any case it is impossible for the appellant to obtain the decree or to obtain the judgment in time, the Court, if satisfied that the appellant is not to blame, may consider that there is "sufficient cause" within the meaning of s. 5, cl. b of the Limitation Act, and may admit the appeal after the period of limitation prescribed by the Act. In such cases, however, a special application will have to be made, and the Court will require to be satisfied not only that there has in fact been delay in receiving the decree or judgment, but that the delay has arisen otherwise than from the fault or negligence of the appellant.

The case will go back to the Bench which referred it with this expression of our opinion.

(1) 2 W. R., Mis., 51

(2) *Ante*, p. 273.

ORIGINAL CIVIL.

Before Mr. Justice Markby and Mr. Justice Pontifex.

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Mar. 23 & 24,
and April 2.

A. BUCHANAN AND OTHERS (PLAINTIFFS) v. J. AYDALL (DEFENDANT)

Contract, Breach of—Damages—Contract Act (IX of 1872), ss. 73, 77, 84, and 107—Resale, Notice of—Rights of unpaid Vendors—Onus—Nominal Damages.

The defendant purchased from the plaintiffs a cargo of Watson's Hartley steam coal at Rs. 21 per ton, to arrive by ship *Grecian*, but on its arrival the defendant, on being called upon to do so, refused to take delivery on the ground that the usual certificate that the coal was what it was stated to be did not accompany the cargo. The plaintiffs thereupon gave notice to the defendant that unless delivery was taken the coal would be sold on his account and at his risk, and on the defendant repeating his refusal to take delivery the plaintiffs caused the coal to be sold, and it was purchased in the name of M. & Co. for Rs. 13 per ton. In a suit, which was stated in the plaint to be for the loss sustained by the plaintiffs on the resale, the Court found that the plaintiffs themselves were the real purchasers, and that the sale had taken place without proper notice, and under the circumstances was invalid. *Held*, both in the lower Court and on appeal, that the plaintiffs had, by the way in which they had dealt with the coal, rendered themselves accountable to the defendant in respect thereof, and that notwithstanding the defendant had committed a breach of the contract in refusing to take delivery of the coal, the plaintiffs were bound to give an account of the coal and prove that they had sustained a loss on the resale, and on their omission to do so they were not entitled to recover any damages.

Held on appeal *per* MARKBY, J., that the plaintiffs were not entitled to put aside the sale as invalid, and treat the case as one for damages for breach of contract. Under the circumstances they were not entitled to even nominal damages. The mere shipment on board the *Grecian* did not pass the property in the coal to defendant under s. 77 of Act IX of 1872.

Per PONTIFEX, J., whether, by virtue of the contract and the subsequent appropriation and shipment, the property in the coal passed or did not pass to the defendant within the meaning of s. 84 or s. 83 of Act IX of 1872, even if the sale were invalid, the plaintiffs were not entitled, considering their conduct in dealing with the coal, and the concealment of their interest in the purchase, and in the absence of satisfactory evidence of what ultimately became of the coal, to recover any damages.

APPEAL from a decision of Macpherson, J., dated the 8th of February 1875.

The facts of the case were briefly as follows :—

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On the 25th of August 1873, the defendant purchased from the plaintiffs a cargo of Watson's Hartly steam coal per *Grecian* at Rs. 21 per ton. On the arrival of the coal in Calcutta the defendant was called on to take delivery, which, after inspection, he refused to do, on the ground that the coal was not "Watson's Hartly" coal, and that therefore he considered the contract cancelled. On the same day the plaintiffs themselves, and on the 15th their attorneys, wrote to the defendant that unless he took delivery the coal would be sold on his account and risk, and he would be sued for all loss, damages, and expenses attendant on such resale without any further reference; on the 16th the defendant through his attorney declined finally to accept the coal; and on the 17th the coal was sold by auction by Messrs. Mackenzie, Lyall and Co. at the rate of Rs. 13 per ton, and realised, after deducting expenses, Rs. 19,448-15, being Rs. 12,778-11-3 below the price which the defendant had contracted to pay. On the 4th of February the plaintiffs' attorneys applied to the defendant "for the immediate payment of Rs. 12,778-11-3, being the loss sustained on the resale on his account and risk of the cargo of Watson's Hartly steam coal ex *Grecian*;" the defendant gave no reply to this demand; and the plaintiffs accordingly brought the present suit to recover this sum of Rs. 12,778-11-3, with such interest as the Court might allow.

The defendant, in his written statement, admitted the contract, but denied any breach thereof; he also stated that the plaintiffs were never ready and willing to perform their part of the contract; that the coal tendered was not "Watson's Hartley steam coal;" that it was usual for such coal to be accompanied by a certificate from the proprietor, and that as none came in the present instance he was not bound to accept the coal.

In the course of the trial it appeared that the coal was purchased by the plaintiffs in Scotland and shipped on board the *Grecian* at Dundee; that the *Grecian* was chartered by the plaintiffs and the bills of lading were made out in their name. The evidence of one of the plaintiffs further disclosed that on the 16th of January the plaintiffs wrote a letter to James

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Finlay & Co., of Glasgow, their correspondents in Scotland, saying that the reason put forward by the defendant for not taking the coal was that it was not accompanied by the usual certificate, and that if the cargo had been so accompanied the difficulty might not have occurred. It further appeared that in the same letter the plaintiffs expressed an intention of purchasing the coal themselves.

MACPHERSON, J. (after a short statement of the contract, the defendant's refusal to take delivery, and the sale by Mackenzie, Lyall & Co., continued):—I have no doubt that the defendant was guilty of a breach of contract; that the market was and had been for some months falling; and that the plaintiffs were, on the 15th of January, justified in calling upon him to accept the coal at once. The main defence set up on behalf of the defendant, as regards the question whether he was bound to take delivery, is that the bill of lading of a cargo of coal of this description is usually accompanied by a certificate, either on a separate paper, or endorsed on the bill of lading, from Mr. Watson, the owner of the mines from which it comes, that it is really his coal: and the defendant contends that he was not bound to accept the coal in the absence of such a certificate. The defendant has not gone into evidence as regards this (or any other,) issue, owing to the opinion which I expressed on the plaintiffs' case when it was closed. Nevertheless, I have no hesitation in saying that there can be no possible doubt that, although it is usual that a certificate from Watson should accompany the bill of lading, it is by no means unusual to find that no certificate is sent. It is quite clear that it frequently happens that the bill of lading is not accompanied by any certificate, and that, in the absence of an express agreement that such a certificate shall be furnished, it is in vain for the purchaser to contend that he is entitled to repudiate his contract merely because of the absence of the certificate.

The ground on which I now dispose of the case is, that the plaintiffs have failed to prove that they have sustained any damage by the defendant's breach of contract. If the plaintiffs had dealt with this coal, after the breach, in the usual manner,

and had, after due advertisement, sold it fairly by public auction through Messrs. Mackenzie, Lyall and Co., they would have been doubtless entitled to charge the defendant with any loss which they sustained as the result of the whole transaction. But the course taken by the plaintiffs was most peculiar and unusual. The peculiarity consists in this, that the plaintiffs hurried on the sale, caused it to be held with the least possible amount of advertisement or notice, and then bid for the coal, and bought it themselves at the greatly reduced price of Rs. 13, buying it under the name of Grish Chunder Mookerjee and Brothers, I say it was purchased by the plaintiffs themselves, because I think, for reasons which I shall presently state, that I am bound to find that they really purchased the coal themselves.

If a purchaser declines to accept goods which he has bought and the seller sells those goods on account and risk of the defaulting purchaser, and buys them himself, he renders himself accountable for what he purchases to the person who has made default, and at whose risk he resold. The plaintiffs contend that they are entitled to draw a line at the sale by Messrs. Mackenzie, Lyall and Co., and to treat the defendant's connexion with the coal as closed from that moment. It is so closed, looking at it from one point of view. But it seems to me to be contrary to the commonest principles of equity that the seller of goods, of which acceptance is refused, should be allowed himself to buy in the goods, and subsequently to resell them at a large profit, putting that profit into his own pocket, while he brings the defaulting purchaser before the Court, and complains that he is damaged to the extent of the difference between the original contract price and the low price at which he himself bought in the goods. Supposing a case in which the seller buys in at a low price, and again resells at a high price, making a clear profit on the whole transaction, in such a case the seller has not, in fact, sustained any damage whatever. How, then, can he ask the Court to find that he has sustained damage? It is said I must draw a line at the sale by auction, and that the moment the coal was then sold the defendant's position was ascertained, and could not be altered, whatever became of the

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were the purchasers. In his letter of the 16th January he said that the plaintiffs intended to purchase. And in his letter of the 28rd January, a week latter, he wrote that the plaintiffs had purchased. Why should I believe Mr. Williamson's statement made now (when a question has arisen which makes it distinctly to his interest to say what he now says) rather than the statement which he, at the time, made in writing home to his ordinary business correspondents? And if this purchase was not really by the plaintiffs, why are not the members of the firm of Grish Chunder Mookerjee and Brothers called to prove their interest? So far as I am at liberty to presume one way or other I am bound in this case to presume against the plaintiffs rather than in their favor. On the whole I find that the purchase at the sale held by Messrs. Mackenzie, Lyall and Co., of this coal, was a purchase by the plaintiffs.

Probably I should be prepared to declare that the plaintiffs are accountable to the defendant in respect of the whole cargo, even if I had believed it to be true that the plaintiffs, as between themselves and certain persons, were beneficially interested in the purchase only to the extent of a ten-anna share. But I find as a fact that the plaintiffs alone were the purchasers.

Taking it that the plaintiffs were the purchasers, and accountable for the coal, what evidence have I upon which I can find that any loss resulted on the whole to the plaintiffs? The plaintiffs have not given any account of the outturn of this coal; and I am told by Mr. Williamson that it is impossible now to give any such account. If it is impossible, all I can say is that it is so much the worse for the plaintiffs. It was the duty of the plaintiffs to keep an account of it, and they are in law accountable to the defendant for it. It is proved (and there is no doubt about it) that a certain portion of this coal, some 460 tons or so, were sold at Rs. 24 a ton, that is to say, considerably over the original price at which the defendant agreed to buy from the plaintiffs. It is also said in a general way by Mr. Williamson that some was sold at Rs. 17, and other prices rising to Rs 24. But in the absence of any account, and, I may say, of any attempt to make up an account, or to give any information on the subject, how can I find that

the coal, as a whole, was not sold at a profit? Supposing the whole was sold at Rs. 24, there must have been a profit.

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Under the circumstances, it is impossible for me to find that the plaintiffs sustained any damage, and certainly I have no materials before me upon which it is possible to say what damage, if any, they have sustained. That being so, the plaintiffs' suit will be dismissed with costs on scale No. 2.

From this judgment the plaintiffs appealed.

Mr. Woodroffe and Mr. Phillips for the appellants.

The *Advocate General*, offg. (Mr. Paul), Mr. Lowe, Mr. Branson and Mr. Apcar for the respondent.

Mr. Phillips.—The learned Judge in the Court below has considered that the sale by Mackenzie, Lyall and Co. was in fact no sale. If so the damages ought to have been ascertained by the market price of the day. [The *Advocate-General*.—The plaintiffs have made a specific case in the plaint and asked for damages which accrued by resale; they cannot shift their ground now. The plaint as framed is for loss on resale, MARKBY, J.—Yes, Mr. Phillips, you must be bound by the plaint.] In the first place, inasmuch as the learned Judge finds that the defendant was guilty of a breach of the contract, he should not have made the plaintiffs pay costs. They were certainly entitled to nominal damages on the facts found by the Court below. Then, with reference to the amount of damages, there were two courses open to the plaintiffs, supposing that the property had passed to the defendant, either to sue for the price of the goods as bargained and sold, or for the difference between the price contracted for and the market price at the time of breach. In the latter case the vendors would be at liberty to resell the goods in order to ascertain the damages—Benjamin on Sale, p. 598; *Maclean v. Dunn* (1). The plaintiffs adopted the latter course. [MARKBY, J.—But are not the plaintiffs bound by the notice they gave the defendant that they were going to sell on his account?] The plaintiffs have done what they gave him notice of, and if the sale under it turns

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out to be invalid, the notice is out of the way, and the plaintiffs are entitled to the difference between the contract price and the market price of the day. The notice does not remain effective merely to bar that right. If the sale is declared a nullity, the notice under which it was held falls to the ground, and the plaintiffs are in the position which they would have occupied if no notice had been given. [PONTIFEX, J.—Does the plaintiff raise any question of market price? The plaintiffs there seek to recover a specific sum on a resale.] They raised the issue in the written statement, and gave evidence upon it, and it is submitted that nothing in the pleadings prevents them recovering the difference between the market and contract price. [PONTIFEX, J.—The Contract Act appears to have taken away the power of selling the property to ascertain damages; s. 107 requires notice, and consequently if no notice is given there is no power to resell.] The Contract Act by giving another remedy to the vendor does not derogate from the power possessed originally under the Common Law. The vendor has more than a simple lien over the property of which the price is not paid and which continues in his possession—Benjamin on Sale, p. 583. As to whether the property had passed from the plaintiffs to the defendant under the Contract Act, no specific appropriation had been made by the former so as to pass the property to the latter, and consequently the plaintiffs did not lose the right of the unpaid vendor either to sue in assumpsit for the price of the goods bargained and sold, or to consider the contract rescinded, holding the defaulting purchasers liable for consequential damages, under the principle laid down by Best, C.J., in the case of *Maclean v. Dunn* (1). [PONTIFEX, J.—would not appropriation under the Act take place by putting the coal on board the *Grecian* ?] It is submitted not, the *Grecian* not having been chartered by the defendant; see s. 84 of the Act and the Illustration thereto. The property in the coal, therefore, did not pass to the defendant, and the plaintiffs were not bound to account for what they realised by the resale. In order to entitle them to damages, it is enough for them to

(1) 4 Bing., 722.

prove the difference between the contract price and the market price at the time of breach.

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The *Advocate General* for the respondent.—The plaintiffs in this Court have attempted to shift their ground entirely. The issue in the Court below was merely whether the sale by Mackenzie, Lyall and Co. was good or not, so as to entitle the plaintiffs to estimate their damages by the difference between contract price and the price realised at auction. That sale being declared to be a nullity, the plaintiffs are bound to prove what they realised by the resale. Instead of keeping to this issue, it has been attempted on appeal to estimate the damages by the difference between the market and the contract price. I submit that at this stage of the case the plaintiffs are precluded from shifting the basis of their claim. S. 107 of the Contract Act gives the seller the option to resell, but having once exercised his option he must abide by his choice. The property passed the moment the goods were ascertained and put on board the vessel—Benjamin on Sale, pp. 265, 272, *Aldridge v. Johnson* (1). According to English law the plaintiffs had three courses open to them,—(1) either to sue the defendant for the price of the goods, (2) or for the difference between the contract price and the market price at the time of breach, (3) or to sell the goods at his risk, giving the defendant notice thereof. The plaintiffs have adopted the third course, and cannot now recede from their position. They are bound to account to the defendant for the resale—Story on Sale, s. 436 a. It would make no difference whether the case was governed by the principles of the English law or by the provisions of the Indian Contract Act; nor would it matter at all whether the property passed or not. [PONTIFEX, J.—Yes, it would make a difference, because if the property did not pass, s. 107 of the Contract Act has no application.] It is submitted that if the property be supposed not to have passed to the purchaser, still the seller having given him notice and undertaken to sell the goods on his account under the provisions of s. 107 of the Contract Act, is clearly bound by his choice. He cannot treat the notice now as a nullity and

(1) 7 Ell. & Bl., 885.

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ask for compensation under Ch. vi of the Act. S. 107 also requires that "a reasonable time" should elapse after notice and before resale. But in this case it has been found as a fact that the plaintiffs shamefully hurried on the sale. In this view they are neither entitled to damages nor costs.

Mr. *Apcar* on the same side.

Mr. *Woodroffe* in reply.—It has been contended that the plaintiffs were bound by their notice to resell. If that is so, the mere fact of the sale being hurried, or of its proving a nullity will not make any difference in the market price ascertained by such resale—*Page v. Cowasjee Eduljee* (1). Under the Contract Act the position of a buyer of ascertained goods is the same as that of a purchaser under a contract with a special reservation of power to resell. S. 107 only applies to sales of ascertained goods; but the goods which the defendant contracted to purchase in this case were not ascertained goods within the meaning of s. 78; and the property not having passed in them, they could not have been resold as provided by s. 107. The plaintiffs are clearly entitled to damages under the Act. S. 73 expressly provides that the party who has suffered from the breach of a contract is entitled to receive from the party who has broken the contract compensation for any loss or damage caused by such breach. The fact of the breach has been found by the Lower Court, there remains then the question of damages, and it is submitted that this must be measured by the market price on the day of the resale.

Cur. adv. vult.

The following judgments were delivered:—

MARKBY, J. (after a summary of the facts and of the defendant's written statement, continued):—The learned Judge has found that the respondent has committed a breach of contract; that the coal was of the kind contracted for; that though a certificate was usual, the respondent could not demand one, and could not repudiate his contract on that account only.

The learned Judge also finds that the market price of the day was Rs. 13. But he also goes on to find that the sale of the coals was hurried on by the appellants; that proper notice of the sale was not given; that the appellants purchased the coal themselves; and that they intended to do so on the 16th, the day before the sale. The learned Judge considers that, under these circumstances, the appellants must show that by the ultimate sale of the coal there was a loss to them on the whole transaction, and that the only evidence being that 460 tons were resold at Rs. 24; and the plaintiffs admitting that they cannot show what became of the rest of the coal, they cannot recover anything. He dismissed the suit with costs.

On the appeal before us the main contention on the part of the appellants has been that the learned Judge having found that the respondents committed a breach of contract, they were entitled as damages to the difference between the market price of Rs. 13 and the contract price of the coal, and that on the learned Judge's own finding they should have a decree for that amount.

The respondent does not deny that between vendor and purchaser this is so as a general rule, but contends that in this case the appellants have elected to take a particular course, in order to ascertain the liability of the purchaser, by which they must abide; that the appellants did not, as they might have done, leave the responsibility of disposing of the coal to the respondent, nor did they repudiate the contract, but held the respondent to it, and exercised their right as unpaid vendors, of selling the coal on account and risk of the purchaser; that the pretended sale by auction was not, however, a sale at all; and that the appellants must account for the coal to the respondent before they can maintain this suit.

Treating this as a suit to recover the difference of price between what the coal fetched and the contract price (which, in form, it manifestly is), and treating the appellants as having exercised their rights as unpaid vendors to sell on account and risk of the purchaser, I think this contention on the part of the respondent is correct. If the sale by auction ought not to be considered as a valid sale as against the respondent, then

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the appellants continued to hold the respondent's coal, and must give some account to him of what became of it; this they have not done.

I also agree with the learned Judge (for I gather this to be his view) that the sale by auction should not be treated as a valid sale. There is no attempt now to dispute the fact that the sale was hurried on in an unusual manner, and without proper advertisements; nor is there any attempt to deny that the appellants purchased to the extent of ten annas on their own account; it is also clear that the appellants concealed the fact that they were the purchasers at the auction by purchasing in the name of "Grish Chunder Mookerjee and Brothers," in whose name they also paid for the coal; and even at the hearing of this suit, when they had been forced to admit that they were interested in the purchase of the coal, one of the appellants gave evidence as to the nature of their interest, which the learned Judge has felt himself compelled to disbelieve; and, under these circumstances, I think this sale ought not to be treated as a valid sale of the coal as between the parties to this suit. The appellants having a cargo of coal thrown upon their hands by the respondent, and, as I must now assume, wrongfully so, were, I admit, in a difficult position; and, provided they had acted openly and fairly, I should have been quite ready to throw all the loss occasioned by an immediate sale, at however low a price, on the respondent. But when it is found that there has been some underhand dealing on the part of the appellants, the matter stands in an entirely different light, and I think it would certainly be improper to allow the appellants to say that so unsatisfactory a transaction was a proper sale by them on account of the respondent.

The appellants have relied very much upon the finding of the learned Judge that the price fetched was the market price of the day. This would only be evidence, and in most cases strong evidence, to show that, in fact, the sale was a fair and proper one; it could not, in itself, make an improper sale into a proper one. But as evidence that the sale was properly conducted, I do not think the (so-called) market price can be relied on in this case. I think it is clear that there was some-

thing very peculiar in the state of the coal market at the time when this sale took place. Coal had shortly before been selling at Rs. 21, and verysoon after it rose to that price again, and even higher. It would seem from the evidence that there were very few sales in or about January 1874; and if it can be said that there was any market price of coal at that time at all, it is clear that it did not represent the value of this coal, for the appellants had, after consultation, instructed their broker to bid, if necessary, up to Rs. 17 at this very sale.

But the appellants contend that they are at liberty to place their claim on an entirely different ground; that even putting the sale by auction altogether out of the question, the appellants were not bound by their notice to sell on account of the respondent; that they may drop this and sue him for a breach of contract, and that on the evidence in this case they are, until the respondent has shown that Rs. 13 was not the market price, entitled to damages accordingly. In fact, they contend now that this is the real situation of the parties; that the property in the coal never did pass to the respondent at all, and that the coal all along belonged to the appellants, who, as owners, could do as they liked with it, holding the respondent liable for his breach of contract.

If the appellants could now take this view, I should be inclined to hold that simply by the shipment on board the *Grecian* the property in this coal did not pass to the respondent, so as to make this a sale within the meaning of s. 77 of the Contract Act. I think this is not a question to be decided simply upon the construction of the provisions of the Contract Act, but upon the intention of the parties, upon which all questions of this kind must ultimately depend. As between merchants dealing in this way, I do not think it is generally intended that the property should pass by such a shipment. But this point was not raised in the Court below, and there may be other circumstances which would have to be considered in ascertaining what the intention really was. It seems to me, however, unnecessary to inquire into this, because I consider that the appellants had put it out of their power now to say that this was not a complete sale of this coal to the respondent,

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by which the coal became his property. They have treated the coal as his throughout, not only in their plaint in this suit, but in all their transactions with the respondent, from the moment the ship arrived; and I think it is now too late for them to say otherwise. This is not a mere question of pleading; the form of the plaint is only one step in a consistent course of conduct, by which, in my opinion, the appellants have finally elected to treat this as a sale of goods to the respondent by which the property passed.

The appellants further contend that they are entitled at least to nominal damages. I have before expressed the opinion, sitting with Jackson, J., that in this Court a plaintiff cannot, as a matter of right, insist upon nominal damages being awarded to him (1). But that is, at any rate, a question which, under the procedure of this Court, is wholly immaterial. We ought not to set aside the decree merely to give the appellants nominal damages. The real question is one of costs, which we have full power, under s. 187 of the Code of Civil Procedure, to deal with, without troubling ourselves about any claim to nominal damages. I agree with the learned Judge generally in his view of the conduct of the appellants; and though I think that, upon the evidence before us, we must also consider the respondent's conduct blameable in having refused to receive this cargo on wholly insufficient grounds, there was no reason why this suit having failed, it should not be dismissed with costs. In my opinion, this appeal ought also to be dismissed with costs.

PONTIFEX, J.—I agree with Macpherson, J., in thinking that the sale by Mackenzie, Lyall and Co. on the 17th of January was a transaction which cannot be supported.

On the 12th January the coal was first ready for delivery, and the defendant expressed his intention to make arrangements for landing it. On the 14th he refused to take the coal, on the ground that it was not "Watson's Hartley." From the plaintiffs' letter to James Finlay and Co., of Glasgow, dated 16th

(1) In *Nabakrishna Mookerjee v. The Collector of Hooghly*, 2 B. L. R., A. C., 276.

January, it appears that the reason put forward by the defendant for not taking the coal was that it was unaccompanied by the usual certificate from Watson that the coal was his coal. "If the bill of lading," wrote the plaintiffs, "had the usual certificate from Watson, the difficulty might not have occurred." Yet, notwithstanding the absence of what the plaintiffs here admit to be "the usual certificate," the sale was hurried on without proper advertisement or notice, in a way which, under any circumstances, would be unreasonable and open to great objection. But when we find that in the same letter of the 16th January the plaintiffs actually express their intention to buy the coal, such hurried and unadvertised sale becomes open to observations of a very serious character. The sale relied upon by the plaintiffs took place on the 17th. The plaintiffs became the purchasers secretly. Whether such purchase was on their own sole account, or on joint adventure with Mookerjee Brothers, is to my mind immaterial. The plaintiffs admit that they were secret purchasers of the large share, and the Mookerjees, if they really had an interest, having purchased with full notice of the circumstances, and having helped to keep secret the fact of the plaintiffs' interest, could be in no better position than the plaintiffs, their partners. Speaking for myself, and upon the evidence as it stands, I am inclined to think with Macpherson, J., that the Mookerjees had no real interest in the purchase at the time it was made.

I repeat, therefore, that I am of opinion that the sale cannot be treated as a valid sale, and that the case must be tried exactly in the same way as if the plaintiffs had taken and kept possession of the coal without any sale by Mackenzie, Lyall and Co.

Now assuming that there was a breach of contract by the defendant (which is an assumption of fact made without hearing his evidence, but which fact, it seems to me upon the evidence taken in Scotland, it would be impossible for him to disprove), what damages ought a jury to give the plaintiffs in this suit.

If, as I am disposed to think was the case, the property in the coal passed to the defendant under s. 84 of the Contract Act by virtue of the contract of August 1873, and the

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subsequent appropriation and shipment on board the *Grecian*, the plaintiffs might have pursued any one of three courses : (1) they might have insisted on the defendant taking the coal, and sued for the contract price ; (2) they might have sued for the difference between the contract price and the market rate at the date of breach ; or (3) they might have resold after the lapse of a reasonable time under s. 107 of the Contract Act, and recovered the difference, if any, between the contract rate and the price obtained at the resale, such price being duly accounted for.

The plaintiffs elected to resell ; but, in consequence of what are, in my opinion, fatal defects in the resale relied on by them, rendering it invalid, they cannot be now treated as having pursued that course.

The plaint is framed so as only to meet a case of a resale at a loss, and entirely conceals the fact that the plaintiffs had any interest whatever in the repurchase. It is enough to say that I cannot commend such ingenious reticence.

But it has been argued, even if that sale were invalid, there is no reason, notwithstanding the form of the plaint, why the suit should not be tried, and the damages assessed, as if the plaintiffs had pursued the second of the courses indicated.

Probably this might be so but for the plaintiffs' own conduct. If they had not carefully concealed the fact that the coal remained in their possession, and under their control until after the market had risen, and in some cases until it had risen above the contract price, the verdict must have been in their favor. But if at any time before trial, or before verdict, the defendant had offered to take the coal at the contract price, paying all costs and charges occasioned to the plaintiffs by reason of his breach of contract, it seems to me that no jury—and we are sitting here as a jury—would give more than a farthing's damages in the action.

The plaintiffs, by their secret purchase, and by the carefully concealed transfer of the coal under the badge of another name, prevented the defendant from having any such opportunity, and by the same means withdrew from our consideration an

element which might have very materially influenced and affected our assessment of damages.

In consequence of that carefully concealed purchase, I, sitting as a jurymen, find myself unable to say what, if any, damages the plaintiffs have sustained.

As a matter of belief, and looking at the very unsatisfactory evidence vouchsafed by the plaintiffs of what ultimately became of the coal, I am inclined to think that the defendant's breach of contract left the plaintiffs, when the coal was ultimately disposed of, with, to say the least, no loss.

If the property in the coal did not pass to the defendant, and the contract between the parties is to be treated as falling under s. 83, and not under s. 84, of the Contract Act, then the plaintiffs' remedy was the same as the second course before indicated—to sue for the difference between the contract price and the market rate. But in that case also the defendant might have materially affected the measure of damages by offering to take the coal and pay expenses at any time before the verdict, and the same conclusion applies as in the other case.

Therefore, whether the property in the coal passed or not, I think Macpherson, J.'s judgment in refusing damages, is correct, and, under the particular circumstances of this case, and having regard to the manner in which the plaint was framed, I think he was also right in making the plaintiffs pay the costs of this suit. I also am for dismissing this appeal with costs.

Appeal dismissed.

Attorneys for the appellants: Messrs. *Berners, Sanderson, and Upton.*

Attorney for the respondent: Mr. *Hechle.*

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APPELLATE CIVIL.

Before Mr. Justice Macpherson, Officiating Chief Justice, and Mr. Justice Lowford.

1875
June. 2.

SHAIKH RYASUTULLA (PLAINTIFF) v. DOORGA CHURN PAL
(ONE OF THE DEFENDANTS.)*

Registrations Acts (XX of 1866), s. 18, cls. 1 & 2, s. 50; and (VIII of 1871), s. 18, cls. 1 & 2, s. 50—Priority of Registered over Unregistered Document—Compulsory and optional Registration.

A registered deed of sale, of which registration was compulsory, does not take effect against a prior unregistered mortgage bond in respect of the same land, the registration of which, it being for a sum under Rs. 100, was optional.

THIS was a suit to recover the amount of a bond with interest, and for a declaration that certain land, which was mortgaged to the plaintiff by the bond, was liable for the amount secured by the bond. The bond, which was unregistered, was for Rs. 95, and was dated the 9th of August 1870. There were different defences set up by different defendants. Doorga Churn Pal, one of the defendants, contended that as he had purchased a portion of the land in dispute *bonâ fide* for Rs. 300 by a registered kobala, dated the 18th of June 1872, the plaintiff could not claim that portion under an unregistered instrument. The Munsif, following the Full Bench decision in *Maharaja Maheswar Bam Sing Bahadur v. Bhikha Chowdhry* (1), made a decree in favor of the plaintiff. On appeal by Doorga Churn Pal, the Judge reversed the decision of the first Court so far as it affected the portion purchased by Doorga Churn Pal. He held that the case cited by the Munsif, being decided upon the provisions of Act XIX of 1843, was inapplicable; that the bond in suit came under s. 18, cls. 1 and 2 of Act XX of 1866, and therefore that the defendant's

* Special Appeal No. 1896 of 1874, against a decree of the Officiating Judge of Zilla Sylhet, dated the 22nd of May 1874, modifying a decree of the Munsif of Lushkurpore, dated the 11th February 1874.

deed being a registered one must, under s. 50, prevail against the plaintiff's unregistered document, there being no fraud on the part of the defendant.

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The plaintiff appealed to the High Court.

Baboo Joy Gobind Shome for the appellant.—The defendant's *kobala* was a document the registration of which was compulsory under s. 17 of Act XX of 1866, while the registration of the plaintiff's mortgage bond was optional, therefore the Judge was wrong in applying the provisions of s. 50 and s. 18, cls. 1 and 2 of Act XX of 1866. The bond was for Rs. 95 only, and under s. 18 it was not necessary to register it. There is no law under which a subsequent registered document shall take effect against a prior document the registration of which was under the Act optional. If the defendant's document had come under s. 18 (i.e., if the registration of it had been optional) the Judge's decision would be right. The question was decided in *Hamed Buz v. Bindra Bun* (1).

Baboo Bharut Chunder Dutt for the respondent.—A registered document must prevail against an unregistered one. In *Soodharam Bhattacharjee v. Odhoy Chunder Bundopadhya* (2), where a plaintiff relied upon an unregistered bond and was met by an allegation of possession on the part of the defendant under a registered deed of sale, it was held that the registered deed of sale must prevail.

The judgment of the Court was delivered by

MACPHERSON, J.—We think that the decision of the Judge is wrong.

S. 50 of Act XX of 1866 says that a registered document of which the registration was optional (i.e., falling under cl. 1 or 2 of s. 18) takes effect against an unregistered document relating to the same property. In this case it is sought to give effect to Doorga Churn Pal's registered bill of sale against the plaintiff's prior unregistered mortgage.

(1) 2 All. H. C. R., 37

(2) 10 B. L. R., 380.

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The plaintiff's mortgage (dated the 28th Sraban 1277, or 9th August 1873) was for Rs. 95 only: therefore, under s. 18 it was not necessary to register it. The consideration for Doorga Churn Pal's bill of sale (dated 5th Assar 1279, or 18th June 1872) was Rs. 300; therefore, under s. 17 it was necessary to register it. Registration was optional in the case of the plaintiff's deed, but compulsory in the case of Doorga Churn Pal's. So that what the Judge has decided is that under s. 50 a registered document, the registration of which was compulsory has effect against a prior unregistered document, the registration of which was optional. But this is not what is enacted by s. 50, which says only that a document of the kinds mentioned in cls. 1 and 2 of s. 18 (i.e., one the registration of which is optional) shall have effect against any unregistered document. Doorga Churn Pal's bill of sale being a document the registration of which was compulsory, did not fall under s. 18 at all: therefore s. 50 has no application to it. This was so decided in the case of *Hamed Bux v. Bindra Bun* (1), and the law remains unchanged in this respect by the new Registration Act of 1871, although the result is somewhat anomalous.

The decree of the Judge is reversed and the decree of the Munsif is restored and affirmed. The appellant is entitled to his costs in this Court and in the lower Appellate Court.

Appeal allowed.

ORIGINAL CIVIL.

Before Mr. Justice Phear.

1875

DHUNRAJ AND ANOTHER v. BROUGHTON AND OTHERS.

Administration—Suit by Creditor—Misjoinder—Multifariousness—Practice

The principle of the rules that the creditor of a deceased person suing for administration is in the same situation with regard to all other persons as if he were bringing an action at law against the administrator, and that a debtor by the estate of a deceased person can only be made answerable as such debtor to the representative of the deceased's estate, is to be adhered to in this country,

where there is a different procedure. Therefore, where to a suit brought against the Administrator-General as administrator of the estate of one W B by a creditor of the deceased, other persons who also had a claim against the estate were made defendants on the allegation that they had realised and were in possession of assets of the estate of the deceased,—*Held*, that there being nothing to show that such persons were in the position of an executor or administrator *de son tort*, or that they had been partners with the deceased, or that they could not be sued, if necessary, by the legal representative himself, and there being no other circumstances which would make it equitable that they should be sued jointly with the legal representative, they were wrongly made parties, and the suit ought to be dismissed as against them for misjoinder.

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Even assuming the facts were such that the plaintiff was entitled to sue them as legal representatives of the estate, he should not mix his own claim with that which the Administrator-General might have against them.

Suit for the administration of the estate and effects of one William Beecher, deceased.

The plaintiffs alleged that William Beecher died indebted to them in various sums; that since his death his estate had come into the hands of the first defendant in his capacity of Administrator-General of Bengal; that the firm of Messrs. Moran & Co. acted as agents to William Beecher during his lifetime; that in the year 1873, some time previous to his death, Moran & Co. instituted a suit in Assam for the foreclosure of a certain mortgage to them by William Beecher of a tea plantation belonging to him, and the plaintiffs submitted that they were entitled to redeem the same on payment of any balance that might be found due to Moran & Co. after crediting the plaintiffs with all sums realised by Moran & Co. since the institution of the suit; that in their capacity of agents to the deceased in his lifetime, Moran & Co. had become possessed of a considerable amount of property belonging to him; that they had realised various sums of money by the sale of the produce from the tea plantations of the deceased; and that they were also attempting to realise the value of an insurance policy effected by him in their name. The plaintiffs prayed for the usual administration decree.

Messrs. Moran & Co. were joined with the Administrator-General as defendants in the suit. The Administrator-General stated that he believed the particulars of the plaintiffs' claim

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were correct, but that no assets had come to his hands, and that he had been consequently unable to institute inquiries into the particulars of the claims of Moran & Co. upon the estate, and he submitted all the matters mentioned in the plaint to the Court.

The defendants, Messrs. Moran & Co., pleaded *inter alia*, that they were wrongly made parties to the suit, and that it ought to be dismissed as against them for misjoinder.

The case came on for settlement of issues on the 14th of June 1875 before Phear, J., when the objection as to misjoinder was argued.

Mr. Macrae for the plaintiffs.

Mr. Phillips for the Administrator-General.

Mr. W. Jackson and Mr. Apcar for Messrs. Moran & Co.

Mr. Macrae.—The defendants, Messrs. Moran & Co., have been rightly joined in this suit. Though, as a general rule, the debtor may not be sued together with the executor, yet there may be special circumstances for which a bill may be brought against both—Williams on Executors, pp. 2019, 2020. Such special circumstances are pointed out in *Barcar v. Birch* (1). Collusion and fraud do not exhaust all the special circumstances which might entitle a creditor to sue a debtor together with the executor. The case here is stronger than that of *Innes v. Broughton* (2), in which Markby, J., allowed the Simla Bank, which had collected assets of the deceased, to be sued with the Administrator-General by a creditor of the deceased. Besides, Messrs. Moran & Co. have by their conduct made themselves executors *de son tort*, and as such are liable, not only to account, but also to be sued with the Administrator-General—*Sharland v. Mildon* (3). As to the plaintiffs' right to redeem, it is submitted that having realised the collateral security; they have opened the foreclosure—Seton on Decrees, p. 394.

(1) 1 De G. Sm., 376.

(2) Unreported.

(3) 5 Hare, 469.

Mr. Phillips, on behalf of the Administrator-General, left the matter to consideration of the Court.

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Mr. W. Jackson for Messrs. Moran & Co.—This suit is bad for misjoinder—*Stainton v. The Carron Company* (1). A debtor and personal representative can be sued together only in special circumstances—*Burrowes v. Gore* (2) and *Pearce v. Hewitt* (3). No such special circumstance exist in this case. In *Sharpe v. San Paulo Railway Company* (4), it was held that one of several cestuis qui trust could not, on an allegation that the trustees refused to take proceedings, maintain a suit against a debtor to the trust estate. The principle laid down there is exactly applicable to the present case. Besides, the plaint is multifarious—*Jerdein v. Bright* (5).

Mr. Macrae in reply.

Our. adv. vult.

PHEAR, J., (after stating shortly the nature of the suit and the facts of the case, continued):—The first question I have to consider is raised by the second defendants to the frame of the suit. It is objected on behalf of Moran & Co. that they ought not to have been joined with the administrator as defendants. This question depends upon two very plain propositions. The first is that the creditor of a deceased person bringing his suit for administration of the estate of the deceased is only seeking to obtain his rights against the estate, and is in precisely the same situation with regard to all other persons as if he were bringing an action at law against the administrator. The difference between the two cases is this:—A Court of Equity will entertain the suit of a creditor, which it otherwise would not do, when by the exercise of its powers of compelling the representative of the deceased to account for the estate and to collect the assets and bring property of the deceased within reach of the Court, it cannot only secure the

(1) 18 Beav., 146.

(3) 7 Sim., 471.

(2) 6 H. L. C., 907, see p. 924.

(4) L. R., 8 Ch., 597.

(5) 2 J. & H., 325.

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rights of the plaintiffs, but also secure equal rights to all other creditors similarly situated. The claim of the plaintiffs is not different from what it would be at law; but equity will on that condition give him the benefit of its superior power of making the estate liable for this claim. This was explained by Lord Cranworth in *Burrows v. Gore* (1). It is thus plain that in a suit of this kind the relative situation of the parties is not different from that which it would be in the form of suit which is the only form recognised by the Common Law Courts at Westminster. In our Court we recognise no distinction as to form of suit. The creditor may ask for the lesser measure of relief or for the larger measure as he may be advised, but he is in either case only entitled to get his claim paid out of the estate by means of a suit against the person who represents the deceased.

The other proposition is that a debtor to the estate of the deceased, or one liable to contribute to or make good any portion of the assets of the deceased, can only be made answerable to the estate by a person who represents the deceased in the matter of the estate.

In some of the decisions which deal with the rules of practice in regard to administration suits, language has been used which would seem to indicate that in some cases these propositions are departed from. But I think when these cases are closely looked into that is not so.

It followed from the first of these that any one who has placed himself in the position of executor or has become administrator de son tort would rightly be sued in equity by a creditor as if he were the legal representative, and of course, therefore, if necessary, he might be sued jointly with the legal representative of the deceased. If there was a period of time, or a portion of the estate with regard to which he had become liable of his own wrong, it would be necessary that he should be made a party to the suit in which an account of the whole estate is taken.

Again, in another class of cases, the situation of the legal representative of the deceased relative to the debtor to the estate whom it was necessary to sue might be such that he could not effectively sue on behalf of the estate, and this might be the case either by reason of the legal representative's own misconduct or

(1) 6 H. L. C., 907. at pp. 924. 925.

otherwise. In such cases a Court of Equity would allow a creditor, or in deed any one who had an interest in the estate being got in, to stand in the shoes of the legal representative for that purpose, and therefore to avoid circuitry of action would allow the creditor, in a suit for administration of the estate against the legal representative of the deceased owner, to join the debtor to the estate as a defendant.

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There is a third class of apparent exceptions also, namely those cases in which it is impossible to take an account of the deceased's estate without also taking an account of his partner's interest in the estate. In such cases the creditor would be allowed to join the partners with the legal representative.

And there may be other grounds upon which a Court of Equity would allow a creditor to join third parties with the legal representative in a suit for administration. All this is very fully explained in the cases referred to by learned counsel in the course of the argument.

In all those cases the two propositions which I have marked out remain distinct and unimpeached, and they must be the guides for me in the present suit.

Now there is nothing in the plaint whatever tending to show that Moran & Co. are in the position of an executor or administrator de son tort. According to the plaintiffs themselves Moran & Co. are holding such portions of the deceased's property as they have in their hands under a claim of right which they have against the deceased which may or may not be well-founded. If the plaintiffs are entitled to make them co-defendants, it cannot be because Moran & Co. are in the situation of executors or of partners of the deceased; but it must be on the ground that they are debtors—persons liable to make good some portion of the estate to the representative, and who for some good reason cannot be sued by the legal representative himself. No reason whatever is shown in the plaint and written statement, unless it be want of money,—and that only by inference,—why the representative should not sue these gentlemen if they are liable to be sued. The conclusion I have come to is that they have been wrongly made parties to the suit, and that the suit should be dismissed as against them. But even if the facts stated are such as

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to enable the creditor to sue Messrs. Moran & Co. as the legal representatives of the estate, I think it is quite clear that the plaintiffs ought not to have mixed the claim of the Administrator-General against Moran & Co. with his own claim and other matter incidental to the suit. This was pointed out very clearly by Lord Hatherly, then Vice Chancellor Wood, in *Jerdein v. Bright*(1), and by Lord Justice James in a recent case, *Sharpe v. San Paulo Railway Co.* (2). It is there stated very distinctly by those very learned Judges that even if the creditor has a right to sue to recover assets from the hands of a debtor to the deceased, he has no right to do so in a suit dealing with other matter. Lord Justice James even doubts the necessity for a suit of this kind, because directions can be given in an administration suit, and the legal representative can be compelled to sue, or if not, the Receiver of the Court can be. For all reasons then the objection to the frame of the suit must prevail, and the suit must be dismissed as against Moran and Co. with costs on scale No. 2. I might add that the principle of those rules should be adhered to in this country, where we have a different procedure.

Suit dismissed as against Messrs. Moran & Co

Attorney for the plaintiffs : Mr. Carrapiet.

Attorneys for the administrator-General: Messrs Orr and Harris.

Attorneys for Messrs. Moran & Co.: Messrs. Berners, Sanderson, and Upton.

(1) 2 J. & H., 325, at p. 332.

(2) L. R 8 Qb., 597, at p. 610.

APPELLATE CIVIL.

Before Mr. Justice Macpherson, Officiating Chief Justice, and Mr. Justice Lawford,

**NATHOO SAHOO (DEPENDANT) v. LALAH AMEER CHAND
(PLAINTIFF).***

1875
May 6.

Mortgage -- Redemption of a Portion of Mortgaged Property -- Purchase of Portion of Equity of Redemption by Mortgages

E mortgaged to *N* certain property, of which *N* caused a moiety to be sold in execution of a money-decree against *E* and himself became the purchaser. The other moiety was sold subject to *N*'s mortgage in satisfaction of another decree, and purchased by *L*. *N*, in exercise of his rights as mortgagee, attached and proceeded to sell the share of *L* in the portion purchased by him, and *L* thereupon, with a view to stay the sale, deposited an amount proportionate to the share held by him. The sale, however, was allowed to proceed. Held in a suit brought by *L* against *N* to set aside the sale, he was entitled to a decree.

THE facts out of which this case arose were as follows :—Ragunath and Rajkumar mortgaged to the defendant Nathoo Sahoo certain properties, viz., an 8-anna share of Dahama, a 5-anna share of Moradpore, and the whole of Shamorah and Goura Sukti. Nathoo, the mortgagee, in execution of a money-decree against Ragunath and Rajkumar, caused one half of Moradpore to be sold, and himself purchased it. The other half was sold in satisfaction of a second money-decree obtained by another creditor, and was purchased in equal shares by Kesho Lal and Ragunath. Kesho Lal's interest subsequently passed to the plaintiff. The sales were made subject to Nathoo's lien under his previous mortgage. Nathoo then enforced his mortgage rights : he first sold 8 annas of Dahama, and afterwards proceeded to attach the shares of the plaintiff and Ragunath

* Special Appeal No. 346 of 1874, against a decree of the Officiating Judge of Zillah Bhagulpore, dated the 28th of November 1873, reversing a decree of the First Subordinate Judge of that district, dated the 15th of May 1873

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 CHAND. in the 5 annas of Moradpore. The plaintiff sought to stay proceedings in execution by depositing a fourth part of the amount of the decree, proportionate to his share. He failed in this, and the sale having taken place, he brought this suit to set aside the sale. Ragnath likewise deposited his share of the debt due under the mortgage.

The first Court considered that the plaintiff's only remedy was in the execution proceedings. Having failed in that his proper course now was to satisfy the mortgagee's lien in the first instance and then to sue him for contribution.

On appeal, the Judge reversed the decree of the first Court and gave the plaintiff a decree. The defendant appealed to the High Court.

Baboo *Kalikisto Sen* for the appellant.—The depositing of a portion of the money due to the mortgagee was not sufficient to stay the sale of the mortgaged property; therefore the sale was good. The mortgagee holds the entire property as security for the entire debt—*Mirza Ali Raza v. Tarasoondersee* (1), *Ram Kristo Manjhee v. Mussamat Ameeroonissa Bibee* (2), *Boodhoo Singh v. Kishen Chunder Ghose* (3), and *Mahtab Singh v. Misree Lall* (4); and separate proceedings in respect of portions of the debt are vexatious, and ought not be allowed.

Mr. *C. Gregory* for the respondent.—The deposit in this case was sufficient, because what was due by the defendant for the shares sold under his own decree and purchased by him would make up the whole amount due on the mortgage. Under these circumstances the plaintiff is entitled to recover—*Mahtab Singh v. Misree Lall* (4) and *Bhairab Chundra Madak v. Nadyar Chand Pal* (5).

Baboo *Kalikisto Sen* in reply.—The Court that was executing the decree could not adjust the accounts and take a portion of the money due under the decree in satisfaction of the whole

(1) 2 W. R., 150.

(2) 7 W. R., 314.

(3) 3 W. R., Misc. 4.

(4) 2 Agra H. C., 88.

(5) 3 B. L. R., A. O., 357.

decree; therefore the Court was justified in selling, and if so the sale ought not to be set aside. Whatever questions might arise between the parties as to the liabilities of each could only be enquired into in a regular suit for contribution.

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CHANG

The judgment of the Court was delivered by

MACPHERSON, J.—We think that the judgment of the lower Appellate Court ought to be affirmed. The point in issue has been expressly decided by the High Court of the North-West Provinces in the case of *Mahtab Singh v. Misree Lall* (1). In that case two mouzahs were mortgaged together, and the equity of redemption in one was subsequently sold in execution of a decree held by a stranger and was purchased by the mortgagee; and the equity of redemption in the other was in like manner sold under another decree and purchased by a third party; and it was held that the latter might redeem the property he had purchased on paying a proportionate part of the mortgage debt. We agree in the observations made in the judgment of the Court that “a mortgagee is entitled to say to each of several persons who have succeeded to the mortgagor’s interest, that he shall not be entitled to redeem a part of the property on payment of part of the debt, because the whole and every part of the land mortgaged is liable for the whole debt. But it does not follow from this that a mortgagee who has acquired, by purchase, a part of the mortgagors’s rights and interests, is entitled to throw the whole burden of the mortgage debt on the remaining portion of the equity of redemption in the hands of one who has purchased it at a sale in execution of a decree against the mortgagor. Each has bought subject to a proportionate share of the burden, and must discharge it.”

We see no reason why the equitable rule applied in that case should not be enforced as between the parties now before us,—the more especially as the person who purchased at the last sale and who complains of the decree which has been made is the mortgagee himself.

We therefore affirm the decree appealed against and dismiss this appeal with costs.

Appeal dismissed.

PRIVY COUNCIL.

P. C.*
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June 3 & 4. RANEE KHAJOORONNISSA AND ANOTHER (DEPENDANTS) v. MIRZA
SAIFOOLLA KHAN, HEIR AND REPRESENTATIVE OF RANEE RYUS-
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MIRZA SAIFOOLLA KHAN, HEIR AND REPRESENTATIVE OF RANEE
RYUSOONNISSA, DECEASED (PLAINTIFF) v. RANEE KHAJOORON-
NISSA AND OTHERS (DEPENDANTS).

[On appeal from the High Court of Judicature at Fort William in Bengal.]
*Mahomedan Law—Exigible Dower—Demand—Application to sue in form
pauperis—Cause of Action—Limitation—Act VIII of 1859, ss. 299, 308.*

The prompt or exigible dower of the Mahomedan law may be regarded as a debt always due and demandable during the subsistence of the marriage, and certainly payable on demand. On a clear and unambiguous demand by the wife for payment, and refusal by the husband to pay such dower, a cause of action accrues, against which limitation begins to run.

An application under s. 299, Act VIII of 1859, by a Mahomedan woman for leave to sue her husband for exigible dower in *form pauperis*, may be taken to express her intention of bringing an action for dower, only if she obtains leave to do so as a pauper. Until she has the Court's permission to sue, her application does not amount to a demand by way of action.

A counter-petition by the husband objecting to the pauper suit being allowed, and denying his liability to pay the dower, does not alter the character of the proceedings, since no opposition on his part can constitute a cause of action, unless there has been a previous demand by the wife; the option being with her to demand the dower or not, and to elect her time for demanding it.

THESE cross-appeals were preferred from a judgment of a Division Bench (Loch and Hobhouse, JJ.) of the Calcutta High Court (1), dated the 23rd April 1870, which in part affirmed, and in part reversed, a decree of the Subordinate Judge of Purneah, dated the 4th September 1869, made in

* *Present*:—SIR J. W. COLVILLE, SIR B. PEACOCK, SIR M. E. SMITH, and
SIR R. P. COLLIER.

favor of Ranees Ryusoonnissa in a suit instituted by her as plaintiff against Ranees Khajooroonnissa and others as defendants

The plaintiff Ryusoonnissa and the defendant Khajooroonnissa were the widows of one Raja Enayet Hossein, a zemindar of the district of Purneah in Bengal, who died in the year 1867. On his death Khajooroonnissa got possession of all his estate, and the plaintiff brought this suit to obtain payment of the amount which she alleged to be due to her under a kabinnama, or deed of dower, executed by her husband at the time of her marriage, in which she stipulated to pay her the sum of Sa. Rs. 1,00,000, one-fourth of which was to be muajjal, or prompt, and the remaining three-fourths muwajjal, or deferred, dower. In making her claim the plaintiff deducted a sum of Rs. 2,000, as having been paid to her by her husband in his life time, and a further sum of Rs. 6,125, for which amount the share of her husbands' estate to which she was entitled to succeed as his widow, was as she conceived, answerable.

Khajooroonnissa defended the suit on her own behalf and as guardian of Syud Ata Hossein, her minor son, who was as she contended, the only lawful son of Raja Enayet Hossein, and his sole successor and representative under a wasiatnama, or will duly executed by him. She denied the genuine character of the kabinnama set up by the plaintiff, or that any kabinnama had been executed on the occasion of the plaintiff's marriage alleging that the plaintiff's dower had been verbally fixed at Rs. 5,000 only, and that more than that some had been paid her. She also contended that the suit was barred by limitation under Act XIV of 1859 on the ground that, as regards the portion of the alleged dower described as prompt, the cause of action arose from the date of her marriage; and in respect of the entire claim that, inasmuch as the plaintiff had been separated from her husband during his lifetime under circumstances which, according to Mahomedan law amounted to a divorce, her cause of action must be taken to have arisen from the date of such separation, which took place about twenty years before the institution of the present suit. She further pleaded limitation on the ground that in the lifetime of the said Raja Enayet Hossein, the plaintiff had applied to a Civil Court for leave to

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sue him *in formâ pauperies*, on a claim of dower based on the alleged kabinnama, in which proceedings the Raja had denied her claim and repudiated the alleged deed, and her petition for leave to sue as a pauper was rejected, and her suit in effect dismissed. The defendant urged that the plaintiff's cause of action arose from the date of such denial or dismissal, which took place more than the prescribed period before the date of the present suit.

The material facts of the case are as follows:—

The plaintiff was married to Raja Enayet Hossein in July 1838, on which occasion the kabinnama, or deed of dower, in question, was, as she alleged, executed. In 1857 Raja Enayet Hossein married the defendant as his second wife. For some years before this second marriage, the plaintiff had been residing in her brother's house apart from her husband, and after the marriage she never returned to her husband. In 1858 the plaintiff applied to the Magistrate for an order upon her husband to pay her maintenance, but this application was refused by the Magistrate, and afterwards, on appeal, by the Civil Judge, on the ground that her husband, in his answer to the claim, had declared his willingness to receive and maintain the plaintiff in his own house if she would return to him. On the 31st May 1861, by the advice of her brother, with whom she continued to reside, the plaintiff being, as she alleged, without means of her own, presented a petition *in formâ pauperis* in the Court of the principal Sudder Ameen of Purneah, in which she prayed that, after enquiry into her circumstances and a due consideration, of the facts of the case, the amount of dower due to her under the kabinnama might be awarded to her. In answer to this claim Enayet Hossein, on the 1st July 1861 filed a counter-petition, in which he denied that the plaintiff was a pauper, or that the deed was genuine; and further contended that the claim for prompt dower was barred by limitation as not having been brought within twelve years from the date of the marriage, and that the claim for deferred dower could not be maintained. On the 27th January 1862, the principal Sudder Ameen, holding it to be proved that the plaintiff had sufficient funds to pay the expenses of the Court, "ordered that her

petition of pauperism be rejected." Raja Enayet Hossein died on the 30th August 1867, and the present suit was instituted on the 13th May 1869.

The following issues were settled by the Subordinate Judge of Purneah, by whom the case was tried:—

"1. Whether or not there was a separation between plaintiff and her husband, twenty-one or twenty-two years ago, before his death, amounting to a constructive divorce, and such separation gave rise in law from the date thereof to a claim for the dower: and the same not having been preferred from such date within the prescribed time is now barred?"

"2. Whether the suit is barred on the ground that it was not laid to prove the kabinnama within the prescribed time from the date of the Raja's denial of that document and amount of dower made on the plaintiff's former application to be permitted to sue as a pauper which was disallowed?"

"3. Whether claim to the portion of the dower sued for asmuajjal, or prompt, is barred by limitation?"

"4. Whether the kabinama impleaded is a genuine deed?"

—"5. What sum is the plaintiff entitled to recover, and against whom should the decree be passed?"

In deciding the first of these issues, the Subordinate Judge held that the separation between the plaintiff and her husband did not, according to Mahom-dan law, constitute a divorce, and that the defendant had failed to establish a case of constructive divorce under the Mahomedan law regarding the effect of an aila, or vow of divorce, as declared in the Hedaya, Bk. iv, Chap. vii. The Judge observed that the claim for maintenance, brought by the plaintiff in 1858, was decided against her on a statement by her husband that he was willing to receive and maintain her if she would return to him, a statement which was inconsistent with the view that he had divorced her before that time. The Judge accordingly held that there had been no divorce between the plaintiff and her husband from which limitation could run against her claim for dower.

With reference to the second issue he held that the plaintiff's claim was not barred by reason that, more than six years before the date of her suit, the deed of dower on which she relied had,

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in the statement put in by her husband in answer to her petition for leave to sue as a pauper, been repudiated by him as a forgery.

With regard to the third issue, the Judge held, on the authority of the High Court decision in the case of *Mussamat Beebee Jumeela v. Mussamat Mulleeka* (1) and the ruling of the Privy Council in the case of *Ameer-oon-Nissa v. Moorad-oon-Nissa* (2), that limitation did not run against the plaintiff's claim for exigible dower until the dissolution of her marriage, and that as that only took place on her husband's death her suit was in time.

As to the fourth issue, the Judge held the kabinnama, or deed of dower, relied on by the plaintiff to be "satisfactorily proved, and without doubt a genuine deed."

In determining the fifth issue he decreed the plaintiff's claim with costs and interest thereon against the defendant Khajooroonissa, with a declaration that the whole amount should be recovered from the estate of Raja Enayet Hossein.

From this decision the defendant Khajooroonissa appealed to the High Court. The points raised in the appeal were, first that the claim in respect of so much of the dower as was prompt, was barred by limitation; second, that the claim in respect of the deferred dower was also barred; and third, that the kabinnama, propounded by the plaintiff, was not executed by Raja Enayet Hussein.

On the second and third of these contentions the decision of the High Court Judges was wholly in favor of the plaintiff, but with regard to the first, they decided that the plaintiff's application in May 1861 for leave to sue as a pauper was not "a mere notice of a claim," but was "a clear, distinct, and positive demand made in a public Court to recover her dower," and that as that demand had been distinctly rejected by her husband in his petition of the 1st July 1861, "her claim for so much of the dower as is prompt must be held to be barred by the law of limitation (s. 1, cl 9, Act XIV of 1859), the suit not having been brought within three years from the date of the cause of

(1) W. R., Jan. to July 1864 252; see also S. C. on appeal to the Privy Council, 11 B. L. R., 375.

(2) 6 Moore's I. A., 211.

action, viz., the refusal on the Raja's part to pay the demand then made."

The decree of the High Court dated the 23rd April 1870, in accordance with the above decision, ordered "that the decree of the lower Court be affirmed, except so far as it allows the plaintiff so much of the dower as is prompt," and declared the plaintiff to be entitled to the amount of her "deferred dower, less one-sixteenth, that is, the share of the plaintiff by right of inheritance in the estate of her deceased husband," and awarded costs in proportion to the amount of the claim decreed, and the amount dismissed.

A petition by the defendant Ranee Khajooroonnissa for leave to appeal to Her Majesty in Council against so much of this decree as allowed the plaintiff's claim for deferred dower, was filed on the 17th May, and was admitted by the High Court on the 3rd June 1870; and a petition for leave to file a cross-appeal to Her Majesty in Council against the same decree in so far as it disallowed the claim for prompt dower, was presented by the plaintiff Ranee Ryasoonnissa on the 6th January, and was admitted on the 3rd February 1871.

On the 10th September 1872, Ranee Ryasoonnissa died, and by orders of the High Court bearing date the 26th April and the 19th May 1873, her brother Mirza Saifoolla Khan was declared the proper person to be substituted on the records of the appeal and cross-appeal in the place of, and as representing, his deceased sister.

By an order of Her Majesty in Council dated the 12th May 1874, the two appeals were consolidated and directed to be heard together.

Mr. Leith Q.C. (Mr. C. Arathoon with him) for the appellant in the first appeal.—The lower Courts were agreed in finding the kabiinama sued on to be a genuine deed. Their finding on that point may therefore be considered conclusive, and the plaintiff under that deed will be entitled to her deferred dower, unless her claim is barred by limitation. If the plaintiff was in fact divorced at the time and in the manner alleged by the defendant, then her claim is barred. The Subordinate Judge was wrong

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in holding that the plea of a divorce under the Mahomedan law had not been established.

Their Lordships intimated that the plea of a divorce could not be supported on the evidence, in the face of the judgments of the lower Courts. The High Court in its judgment had endorsed the finding of the Subordinate Judge. There were no facts to support the appeal.

In the cross-appeal Mr. *Doynes* and Mr. *John Cutler* for the appellant.—The High Court was wrong in holding that the limitation applicable to the plaintiff's claim for dower was that of three years under cl. 9, s. 1, Act XIV of 1859. That clause provides for contracts not in writing. The plaintiff sues on a written contract, which could not have been registered under Regulation XXXVI of 1793, the Registration Law in force at the place and time of its execution. The limitation applicable to the suit is therefore that of six years under cls. 10 and 16 of the section and Act cited. It is of no importance, however, whether the limitation period is three years or six, since if the plaintiff's cause of action in respect of prompt dower arose at the date when she applied for leave to sue as a pauper more than six years had elapsed since that time. The High Court, treating her application as tantamount to a demand, has held that time runs against the plaintiff from the date when that application was rejected. But it was a mistake to construe the plaintiff's application into a demand. A demand may be by suit. But a petition for leave to sue is not a suit. The petitioner in making an application is bound by the law (s. 300, Act VIII of 1859) to draw the petition in the shape of a plaint, but the primary object is to establish the fact of pauperism, so as to obtain the sanction of the Court to the suit proceeding without costs. No demand is intended to be made at this stage of the case, nor until the Court grants the permission to sue. Before such permission is given, a denial of liability is mere surplusage. The only question raised by the plaintiff's petition was whether or not she was a pauper. In the cases of *Ameer-oon-Nissa v. Moorad-oon-Nissa* (1) and *Mussamat*

Beebee Jumeela v. Mussamut Mulleeka (1), it was decided that a wife was not bound to sue during her husband's lifetime for her exigible dower. Here she has not sued. There has been no demand and no suit to set limitation running.

Mr. Leith, Q.C. (Mr. C. Arathoon with him) for the respondent.—The cases cited show that exigible dower becomes due on demand; see also Macnaghten's Principles of Mahomedan Law, Bk. i, Ch. vii, Rule 22. The plaintiff's cause of action was complete as soon as she demanded payment and her husband refused it. The High Court was right in treating the proceedings on the plaintiff's application for leave to sue as a pauper as tantamount to a demand and refusal. [Sir B. PEACOCK.—Is not the effect of her petition merely to say "If you will allow me to sue without costs, I will make a demand for my dower if you refuse, I reserve my right to make the demand hereafter?"] We contend that the plaintiff's petition and her husband's counter petition are to be read together, and so read constitute demand and a refusal. A demand may be by suit. To enable a wife to maintain her suit for dower, it is not necessary that there should have been a previous demand. [Sir B. PEACOCK cited *Birke v. Trippet* (2) as showing in what cases a previous demand is necessary to give a right of action.]

Mr. Doynes in reply.

Their LORDSHIPS' judgment was delivered by

Sir M. E. SMITH.—These cross-appeals arise in a suit brought by the Ranee Ryusoonnissa against the Ranee Khajooroonnissa, the defendant being the representative of the estate of Raja Enayet Hossein. The suit was brought to recover the sum of Rs. 1,00,000 in respect of dower, less certain payments which had been made in the lifetime of the Raja, and which reduced the total claim under the contract of dower to Rs. 91,875. The two Ranees were the widows of the Raja.

(1) W. R., Jan. to July 1864, 252; S. C., on appeal to Privy Council 11 B. L. R., 375.

(2) 1 Wms. Saund., 286.

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The plaintiff Ryaseonniassa was the elder wife; and it appeared that she had separated from her husband several years before his death and before his marriage with the Ranee Khajooronniassa. The claim for dower is divided into two parts. By the kabinnama, under which the dower was agreed to be paid, one-fourth was declared to be prompt, and the remaining three-fourths deferred, dower. The Principal Sudder Ameen gave judgment for the plaintiff for the full amount of her claim, that is, both for the prompt and for the deferred dower. On appeal the High Court affirmed so much of the judgment of the Principal Sudder Ameen as related to the deferred dower, but reversed it as to the prompt or exigible dower, being of opinion that there had been a demand of that dower in the life-time of the Raja and a refusal of it, and that the claim was barred by the Statute of Limitations. Both the Ranees appealed from that decision. The Ranee Khajooronniassa appealed upon the ground that the kabinnama itself, which was the foundation of the Ranee-plaintiff's claim was not a genuine document, and also upon the ground that the deferred dower was barred by the Statute of Limitations. The ground upon which the deferred dower was alleged to be barred was that there had been a divorce between the parties, and that the deferred dower then became payable. It was also said that the Raja had made an aila, or vow, that he would have no further intercourse with his wife, and that that also made the dower payable at a period which would render the Statute of Limitations a bar.

On the opening of the appeal for the Ranee Khajooronniassa by Mr. Leith, it clearly appeared that the facts entirely failed the appellant, and that no question really arose for their Lordships' decision. The genuineness of the deed was entirely a question of fact, which had been decided by both the Courts below in favor of the Ranee, the plaintiff. With regard to the divorce and the aila, these also were questions of fact which had, in like manner, been decided against the Ranee-defendant. Her appeal therefore must be dismissed, and dismissed with costs.

The only question in the cross-appeal, and it is a question of some importance, is whether the prompt dower is barred by

reason of there having been, as alleged on the part of the defendant-Ranee, a demand and a refusal of that dower in the lifetime of the Raja, beyond the period prescribed by the Statute of Limitations.

It is not necessary to decide whether the limitation to be applied is that in the 9th clause of the 1st section of the Act XIV of 1859, or that in the 16th, because whether the term be the three years mentioned in the one, or the six years mentioned in the other, the interval between the alleged breach or cause of action and the commencement of the suit has been longer than either. For the present purpose, the terms used in the two sections, although, differing in language, are the same in substance. The limitation in one runs from the breach of the contract, in the other from the cause of action. If there had been a breach, there would be a cause of action; therefore the terms may be regarded as identical so far as the decision of the present appeal is concerned.

The question is whether certain proceedings, which were taken by the Ranee Ryusoonnissa in Court with a view to obtain leave to sue her husband for this dower *in formâ pauperis*, amount to such a demand as would be sufficient to constitute a cause of action within the meaning of the Statute. It is unnecessary to say what would have been the effect of an abortive suit brought at that time, because their Lordships are disposed to come to the conclusion that these proceedings did not arrive at the stage when they became a suit. The object of the Ranee was to place herself in a position to maintain a suit as a pauper, without incurring the expense, which she alleged she was unable to pay, of a regular suit. Her application to the Court was for that purpose: but in making it, she was obliged to conform to "The Civil Procedure Code," Act VIII of 1859. The portion of the Act which relates to pauper suits requires that the application when made shall be by petition, containing the particulars required in regard to plaints, the object being that, if the application be ultimately successful, the petition is to be deemed the plaint in the suit. But the application to the Court is really only for permission to sue *in formâ pauperis*. S. 209 says:—"The application to the Court for permission to

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sue *in forma pauperis* shall be by petition, which shall be written on a stamp paper of the value of eight annas." Then S. 308 enacts :—" If the application of the petitioner be granted, it shall be numbered and registered, and shall be deemed the plaint in the suit, and the suit shall proceed in all other respects as an ordinary suit, except that the plaintiff shall not be liable to any further stamp duty in respect of any petition, appointment of a pleader, or other proceeding connected with the suit, or with the execution of any decree passed on it." Therefore, if the application of the Ranee had been successful, the petition would have been turned into and would have become a plaint. But it was unsuccessful. The Principal Sudder Ameen was of opinion that she had sufficient means to pay the expenses of the Court, and ordered that the petition " of pauperism be rejected." Her application, therefore, fell to the ground, and the petition never became a plaint.

Since the decisions which have taken place at their Lordships' Board, there is really no doubt as to what is the nature of prompt or exigible dower, and under what circumstances the Statute of Limitations will run. Prompt or exigible dower may be considered a debt always due and demandable, and certainly payable upon demand, and therefore, upon a clear and unambiguous demand and refusal, a cause of action would accrue, and the Statute would begin to run. The question here is whether the proceedings to which reference has been made really do amount to such a demand. No doubt, the form of the proceedings takes the shape of a demand in a plaint, but their Lordships think that, with a view to ascertain the intention of the Ranee, and the force to be attributed to her application, they must look at the substance and nature of the proceedings, and consider that the form is that prescribed by the law, and is not the voluntary choice of the parties. So regarding them, what the Ranee says to the Court, is no more than this—" I desire to make a demand against my husband in the form of a suit, if you will enable me effectually to do so by allowing me to sue *in formâ pauperis*." The Court rejects her application, and says—" we will not allow you to make a demand in that way." The petition of the Ranee seems to their Lordships to

be an expression, and a strong expression, of an intention to sue the husband in that form if she is permitted to do so. but it does not appear to them to amount to a demand by way of action until she has that permission. The application she makes to the Court to be allowed to bring an action is made conditionally only upon her obtaining leave to do it as a pauper.

It is said that the husband, by his counter-petition, denied his liability to pay the dower, raising several objection both to the deed and to the amount claimed; but their Lordships think that his opposition does not alter the character of the proceedings. No amount of opposition on his part would be sufficient to constitute a cause of action, unless the wife had made a previous demand. The option lay with her to demand the dower or not. It was for her to elect the time at which she would do it, and if she has not done it, his opposition, however strongly expressed, would be immaterial.

It is to be observed that there is no evidence of any demand other than the proceedings referred to.

Under these circumstances, their Lordships think that the ground upon which the Court held that the Statute of Limitations applied fails, and that the appeal on the part of the plaintiff Ryusoonnissa, ought to succeed. In the result, therefore, they will humbly advise Her Majesty to dismiss the appeal of the Ranee Khajooroonnissa, and to allow the appeal of the Ranee Ryusoonnissa, and to direct that the judgment of the High Court be reversed, and the decree of the Principal Sudder Ameen affirmed. Their Lordships are also of opinion that the Ranee Ryusoonnissa should have the costs incurred in India and the costs of these appeals.

Appeal of Ranee Khajooroonnissa dismissed.

Appeal of Ranee Ryusoonnissa allowed.

Agent for the plaintiff: Mr. Barrow.

Agents for the defendant: Messrs J. H. and H.R. Henderson.

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ORIGINAL CIVIL.

Before Mr. Justice Markby and Mr. Justice Pontifax.

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March 17,
18, and 22,
and April 13.

JUGGODUMBA DOSSEE AND OTHERS (DEFENDANTS) *v.* PUDDO-
MONEY DOSSEE AND OTHERS (PLAINTIFFS).

*Jurisdiction—Letters Patent 1865, cl. 12—Suit for Land—Trust Estate—
Receiver—Account.*

The plaint in a suit brought by some of the persons appointed trustees under a deed of endowment of certain land against their co-trustees who were in possession alleged that the defendant-trustees had ousted the plaintiffs and had committed breaches of trust, and prayed that the deed might be construed and given effect to, and for a declaration that the plaintiffs were entitled to be sebaits jointly with the defendants, for the settlement of a scheme for the performance of the worship, for the appointment of a receiver, for an injunction to restrain the defendants from interfering with the property, and for an account. By the deed the land was given to idols named therein, and the plaintiffs and defendants were appointed sebaits and managers of the property, and were directed to accumulate for the benefit of the idols any surplus over and above the expenses of management, but were themselves to have no beneficial interest in the property. The land the subject of the deed was situated out of Calcutta, but all the parties to the suit resided within the local limits of the High Court's jurisdiction. *Held*, that the suit was not a suit for "land or other immovable property" within cl. 12 of the Letters Patent, and therefore the Court had jurisdiction to entertain it without leave to sue being obtained. The Court might, if necessary, appoint a receiver of such property and direct an account.

APPEAL from a judgment and decree of Macpherson, J., dated the 21st December 1874.

The facts of the case were as follows:—One Rasmoney Dossee, the ancestress of the plaintiffs and defendants, by a Bengali instrument, dated the 18th February 1861, gave by way of debutter to certain idols lands situated in the village of Dhuckin-essur in the 24-Pergunnas and in the District of Dinagapore, and constituted herself sebaith during her lifetime, and provided that after her death her daughters, the plaintiff Puddomoney and the defendant Juggodumba, and their sons jointly, and their heirs from generation to generation, should be sebaits; that the

dedicated lands should be recorded in the Collectorate in the joint name of the idols and the sebaits for the time being, but that such sebaits should have no power of alienation, nor any heritable or proprietary right therein, and that all surplus funds, after providing for the management of the property and the worship of the idols, should be deposited or credited in the names of the idols, to meet possible future deficits; that the sebaits for the time being should do all acts necessary for preserving the property, conducting the worship, &c., in consultation with each other, and that any sebaith acting in contravention to the directions contained in the instrument should be forthwith excluded from the sebaithship. On the death of Rasmoney in 1861 the plaintiff Puddomoney and the defendant Juggodumba entered into possession of the dedicated property, and by an arrangement between themselves held the property and worshipped the idols by turns of one month each. In 1866, however, Puddomoney raised a question as to the validity of Rasmoney's deed of settlement, whereupon, on the 15th February 1867, Juddoonath Chowdhry and Bhopal Chunder Biswas, two of the now defendants, instituted a suit against her and the other parties to the present suit in the Court of the Principal Budder Ameen of the 24-Pergunnas. The object and result of that suit are thus described by Macpherson, J., in the judgment under appeal:—"In that suit the now defendants, Juddoonath Chowdhry and Bhopal Chunder Biswas, sued to have the deed of gift of 1861 construed and given effect to, and in particular to have it declared that they are entitled to be sebaits jointly with others, and that Puddomoney had forfeited her rights as sebaith by reason of the line of action she had adopted in denying her mother's right to give the property to the deities and refusing to recognise the gift to them as valid. They also sought an account from Puddomoney and Juggodumba. On the 20th of May 1868 the parties to that suit filed a razinama and safnamas. The effect of these is that all parties agreed to admit the deed of gift of February 18th, 1861, to be a valid deed giving as debutter the properties therein named and appointing sebaits, and to admit that under the deed all the parties to the suit were then jointly sebaits; and they

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all further agreed that they would jointly as sebaita manage the property and keep up the worship of the deities, &c., as provided in the deed of February 18th. 1861, and in a certain list of services, &c., signed by Sreemutty Rasmoney Dossee in 1265, which was filed with the plaint in the Court of the Subordinate Judge of the 24-Pergunnas, the plaintiffs (Juddoonath Chowdhry and Bhopal Chunder Biswas) relinquishing their claim for an account and for a declaration that Puddomoney had forfeited her position as sebait. Upon this settlement the only decree made was that 'the suit be decreed in the terms of the razinama and safinamas.'"

Shortly after this decree the plaintiff Puddomoney, who was then in possession of the property under the arrangement between herself and the defendant Juggodumba, let the latter into possession with the request, as she alleged, that some arrangement might be come to whereby all the trustees appointed by the deed of 18th February 1861 might take part in the management of the dedicated property.

In July 1868 the defendants' attorneys wrote to the attorneys of the plaintiffs accusing the latter of refusing to make proper arrangements for the management of the property and the conduct of the worship. This was denied by the plaintiffs' attorneys in a letter of the 28th July, wherein they stated that if the defendants would propose some arrangement for carrying out the trusts, the plaintiffs would join with them at once, provided the arrangement were a reasonable and proper one. To this letter no reply was received. In 1871 the plaintiffs applied to the Collector of the 24-Pergunnas to have their names registered jointly with those of the defendants as sebaita of the Duckinessur property. The defendants opposed the application, and it was rejected by the Collector. On appeal by the plaintiffs the Commissioner reversed this order, but subsequently reviewed his own order and remanded the application to the Collector for enquiry as to the plaintiffs' possession. An appeal by the latter to the Board of Revenue having been refused, and the defendants failing to admit the plaintiffs to a share in the management of the trust upon a demand made by the plaintiffs, they on the 20th of June 1872 brought the

present suit. They charged that from the time the defendants had obtained possession after the consent decree they had ousted the plaintiffs and prevented them from obtaining possession, and had refused to allow them to take part in the worship, and had excluded them from the collection of the rents of the dedicated property. They also charged the defendants with misappropriation, but gave no evidence in support of this charge. They prayed that the deed of the 18th February 1861 might be construed and given effect to; and for a declaration that they were entitled to be sebaits jointly with the defendants, for the settlement of a scheme for the performance of the worship, for a receiver, for an injunction restraining the defendants from interfering with the property pending the suit, and for an account.

The material defences raised in the defendants' written statements were, that inasmuch as the dedicated lands were situated beyond the local limits of the Court's jurisdiction, the suit so far as it sought to interfere with their possession of those lands as sebaits, by the appointment of a receiver and the issue of a writ of injunction, "or otherwise howsoever to obtain possession of or establish rights over" the lands, was a suit for land, and therefore not cognizable by this Court; that so far as it sought for a declaration of the plaintiffs' right to act as sebaits, and for the settlement of a scheme for the performance of the worship, it was also not cognizable by this Court (three of the defendants however did not take this defence, and stated that they desired the worship to be conducted by turns); that the plaint disclosed no cause of action; that the plaintiffs had acted in contravention of the provisions of the deed of settlement, and had thereby excluded themselves from the sebaits; that notwithstanding the consent decree the plaintiffs had neglected and refused to take part in the management of the property and the performance of the worship, and were therefore disentitled to relief; and they denied that they had ever ousted the plaintiffs or prevented them from acting in the trusts.

All the parties resided within the limits of the Court's jurisdiction, and no leave had been obtained to institute the suit.

MACPHERSON, J.—The substantial issues are, firstly, whether this is a suit for land or other immoveable property

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situated in the mofussil, and whether on that account this Court has no jurisdiction; secondly, whether the cause of action has been tried and determined already in 1868, in the suit in the Court of the Subordinate Judge of the 24-Pergunnas, and whether this suit is now cognizable here, with reference to s. 2 of Act VIII of 1859, or otherwise; and thirdly, whether the plaintiffs or any of them have, under the provisions of the deed of gift of February 18th, 1861, forfeited their rights as sebaits by reason of their conduct,—i.e., neglect or refusal to perform their duties as sebaits.

As regards the first issue, I think that the suit is not a suit for land or other immoveable property, and that this Court has jurisdiction as all the parties are personally subject to the jurisdiction. It is a suit by one trustee against another to have the deed of trust under which both are appointed construed and given effect to, and to protect the trust property from the alleged improper acts of the defendant trustee. The deed of gift of the 18th February 1861 gives neither the plaintiffs nor the defendants any beneficial interest in this property. The property is given to the deities named; the plaintiffs and defendants are appointed sebaits or managers of the property and of the worship, and at the same time are expressly directed to accumulate for the benefit of the deities any surplus which may remain after defraying the expenses of management and keeping up the worship, &c. Under the deed the sebaits have no sort of personal beneficial interest in the property, and they have no right to appropriate any portion of it, or of its income. And their position is not altered in this respect by the consent decree of May 20th, 1868. This being the case, the suit is, in my opinion, a suit for land or other immoveable property within the meaning of cl. 12 of the Letters Patent, even although the plaintiffs seek to have it declared that they are trustees and managers jointly with the defendants of lands in the mofussil. If the plaintiffs as co-trustees are entitled to an account from the defendants of the trust moneys come to their hands and their application thereof, I cannot see how the fact that those moneys are derived from lands in the mofussil can deprive this Court of jurisdiction, when the accounting party is personally subject as

being a resident of Calcutta. In so deciding I follow the current of decisions in this Court:

As regards the second issue, I think that the proceedings in the Court of the Subordinate Judge of the 24-Pergunnas are no bar to the present suit. (The learned Judge stated the nature and result of those proceedings as above, and continued):— 'The plaintiffs' case now is, that since that consent decree was made the defendants have declined to allow them any of the privileges of sebais, and have refused to carry out the agreement that all parties to the former suit would act jointly as sebais. It has been said in argument that the proper course for the plaintiff to take is to apply to the Court of the Subordinate Judge of the 24-Pergunnas in the former suit. I know of no application which the plaintiffs could make in that suit on which they could get the relief they now seek, or any portion of it. Supposing the plaintiffs to be entitled to any relief by reason of the defendants having failed to carry out the terms on which the former suit was compromised, that relief can clearly be got only in a new suit, and not by any application in the old. It may perhaps be doubtful how far these parties, being all mere trustees, could properly consent to a decree which in fact construed the trust deed on a very important point, viz., as to their being all jointly entitled as sebais. But however that may be, there is no decree in that suit upon which any execution could issue; and if any relief is to be had in respect of the agreement embodied in the decree it can only be had by a fresh suit.

(After finding on the third issue that the defendants had ousted the plaintiffs, and that the plaintiffs' conduct was not such as to deprive them of their rights as sebais, the learned Judge continued):—

The plaintiffs are entitled to a declaration that, under the decree of 20th May 1868 and the agreement therein embodied, they are sebais jointly with the defendants, and entitled to all their rights and privileges as such, and to an order that the defendants do admit them to all these rights and privileges and to join with them as co-sebais in the management of the trust and the keeping up the performance of the worship, as agreed upon.

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when the suit in the 24-Pergunnas was settled. They are also entitled to a declaration of their right to have their names entered in the Collector's register as sebaits jointly with the defendants, whose co-trustees they are, and to an order that the defendants to join them in all necessary acts to enable them to have their names so registered.

The Court is asked by the plaintiffs to direct that the several sebaits shall have the management, &c., by pallas, or turns, each holding it for a certain time in rotation. And the defendants Juddoonath Chowdhry and Bhopal Chunder Biswas and Troy-luckonath Biswas say in their written statements that they also desire this. The other defendants oppose it, and contend that the management must remain joint.

I think it is not a case in which pallas should be ordered. It is not as if the parties had any beneficial interest in the settled property; for this is simply a naked trust of which they are the trustees. The deed of February 1861 shows clearly that the intention was that the management should be joint. Then the parties chose themselves to put their own construction on the deed, when they settled the suit in the Court of the Subordinate Judge of the 24-Pergunnas in May 1868, and agreed that the management should remain joint. I am well aware of the difficulties arising from such a joint sebaitship; but in a trust like this where the trustees (and both Puddomoney and Juggodumba ought to recollect that in this matter other people occupy exactly the same position in which either of them was) are co-equal in power, the voice of the majority must prevail so long as the trust is duly kept in view and properly given effect to. The plaintiffs' rights being now ascertained and declared, it is to be hoped that the parties will for their own sakes have the good sense to act together in the matter for the future. If they decline or avoid doing so, and the trusts confided to them are not carried out in consequence, it may be that it will become necessary to remove them altogether from the trusteeship and to appoint new trustees who will carry out the trust.

As regards the appointment of a receiver (which the defendant Juddoonath Chowdhry, in his written statement, asks for as

well as the plaintiffs), I should not hesitate to make such an appointment so far as any question of jurisdiction is concerned. But it is undesirable to interfere in the management of a trust such as this, if the sebaits will but carry it out among themselves. I shall therefore not appoint a receiver at present in the hope that the parties will be reasonable. But I shall reserve leave to the plaintiffs to apply hereafter for the appointment of a receiver, if the conduct of the defendant Juggodumba or the other defendants should render it necessary.

Inasmuch as I consider that the plaintiffs have been kept from acting in the sebaitship from the time that Juggodumba got possession after the consent decree in 1868, I think that they are now, in strictness, entitled to an account from the defendants of the rents and profits received by them, and of its expenditure, and I must direct such an account to be taken if it is insisted upon. Whether it is necessary that the plaintiffs should insist upon it is another matter, and if insisted upon, it will be at the plaintiffs' own risk as regards costs, which will in no event be allowed out of the estate. Juggodumba Dossee is no doubt the principal accounting party. But the accounts must be taken as against the other defendants also, for they (with the exception of the infant) admit in their written statements that their names have been used by Juggodumba with their permission.

The defendant Juggodumba Dossee will pay the plaintiffs' costs up to decree on scale 2. The defendants will respectively bear their own costs on scale 2.

From this judgment the defendants appealed.

Mr. Lowe and Mr. Woodroffe for the appellants.

The Advocate-General, offg. (Mr. Paul), Mr. Branson, and Mr. Bonnerjee for the respondents.

Mr. Lowe contended that all the parties to the present suit having been parties to the suit in the 24-Pergunnas, the present suit was unnecessary and improperly brought.

Mr. Woodroffe on the same side.—The plaintiff came into Court asking for the joint sebaitship, and not for separate pallas. The

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decree is bad as interfering with the possession of immoveable property beyond the local limits of the Court's jurisdiction. *Bagram v. Moses* (1) decides that if the defendant be personally subject to the jurisdiction and admits a trust, the Court may declare what is the nature of the trust, although it cannot adjudicate upon the right and title to land beyond the jurisdiction: but in this case the appellants never admitted the existence of any trust in the respondents' favor. *Ohintaman Narayan v. Madhuvrao Venkatesh* (2), which may be cited by the other side, was a suit for debt. In *Denonath Sreemoney v. Hogg* (3) the plaintiff had bought at an execution sale certain land which had been mortgaged. The mortgagee foreclosed in the Supreme Court, and a receiver was appointed by that Court. The plaintiff sued the receiver in the High Court, praying that his suit might be taken as supplementary to the suit for foreclosure; and he asked for an account, and that if the mortgage debt should be found to have been paid, then that the receiver might be discharged and directed to allow the plaintiff to obtain possession, and if the debt had not been paid then that the plaintiff might redeem. But Wells, J., held that this was a suit for land out of the jurisdiction and not cognizable by this Court. Suits for foreclosure or redemption of land out of the jurisdiction cannot be brought here—*Bibes Jaun v. Meerza Mahomed Hadee* (4), *Sreemutty Lalmonay Dossee v. Juddoonanth Shaw* (5), and *Ramdhone Mullick v. Blackquive* (6); and the same has been held with regard to a suit for the recovery of a mortgage debt, and in default of payment for sale of the mortgaged land—in *re Leslie* (7). The Court cannot make a declaratory decree except where it could give consequential relief if asked for. *Paget v. Hde* (8) will be relied upon, but it is submitted that it is not applicable here; and Macpherson, J., expressly says that he decides the case on the current of authorities in this Court. *Penn v. Lord Baltimore* (9) shows the principles

(1) 1 Hyde, 284.

(2) 6 Bom. H. C. Rep., A. C., 29

(3) 1 Hyde, 141.

(4) 1 I. J., N. S., 40.

(5) 1b., 319.

(6) reported in *The Englishman* newspaper, Sept. 11, 1865.

(7) 9 B. L. R., 171

(8) L. R., 18. Eq., 118.

(9) 2 W. & Ta. L. Ca., 4th ed., 923.

upon which the Court of Chancery bases its jurisdiction; and see also *Cartaret v. Petty* (1) and *Pike v. Hoare* (2). The appointment of a receiver would be doing indirectly what the Court cannot do directly, *viz.*, putting the plaintiffs into possession. The plaintiffs have made out no case for an account; they have not proved any misappropriations by us, nor any ouster: the case was one of acquiescence on their part in our exclusive possession. As to the granting an account, see *Hadjee Ismail Hadjee Hubbeeb v. Hadjee Mahomed Hadjee Joosub* (3). If the plaintiffs have any rights whatsoever they should have proceeded to enforce them in the suit in the 24-Pergunnas. [MARKBY, J.—The only procedure for enforcing decrees which are neither for money nor land is that provided by s. 200 of Act VIII of 1859, but that section would not apply to a decree like the consent decree] Such a decree could be enforced by the Mofussil Courts as readily as by this Court.

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The *Advocate-General* for the respondents.—The settlement deed provides that any surplus income is to be invested in the names of the idols. As trustees we are entitled to an account, for without it we could not tell whether there was any surplus. Substantive relief has been granted in so far as the accounts are ordered, and the defendants directed not to oppose the registration of our names in the Collectorate. This is not a suit for possession; we can act as managers without entering into possession. This Court cannot give possession of lands out of the jurisdiction as the Supreme Court could, but its jurisdiction *in personam* is not taken away. The principles upon which *Paget v. Ede* (4) was decided are of equal force here. *Penn v. Lord Baltimore* (5) clearly shows that the Court would make a decree *in personam* against a trustee who is in its jurisdiction. *Ragran v. Moses* (6) is decisive of this case.

Mr. Branson, on the same side, cited *Lord Cranstown v. Johnston* (7).

(1) 2 Swanst., 823, note.

(2) 2 Eden, 182.

(3) 13 B. L. R., 91, at p. 99.

(4) L. R., 18 Eq., 118.

(5) 2 W. & Ta. L. Ca., 4th ed., 923.

(6) 1 Hyde, 284.

(7) 3 Ves., 170.

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Mr. *Woodroffe* in reply.*Cur. adv. vult.*JUGGODUMRA
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The judgment of the Court was delivered by.

MARKBY, J. (who, after stating the facts, continued):—As we intimated in the course of the argument we concur with the learned Judge in his finding upon the second and third issues. We think that this suit is not barred by the previous suit in the 24-Pergunnas, and that the plaintiffs have not forfeited their rights as co-sebais.

Upon the first issue the learned Judge has held that this suit is not a suit for land or other immoveable property, and therefore that, under cl. 12 of the Letters Patent of 1865, the parties being all personally subject to (i. e., resident within) the local limits of the original jurisdiction of this Court, the suit will lie. His view is that the deed of February 1861 gives no beneficial interest whatsoever to any of the parties, and that this position is not altered by the decree of the Court of the 24-Pergunnas; that the prayer for declaration that the plaintiffs are co-trustees and managers with the defendants of lands in the mofussil does not make this a suit for lands in the mofussil; and also that this Court has jurisdiction to order persons resident in Calcutta to render an account, although the moneys in respect of which the account is prayed may come from lands situated in the mofussil.

No leave having been obtained under cl. 12 to sue in this Court, the question turns entirely upon this, whether this is a suit "for land or other immoveable property." If it is, this Court had no jurisdiction.

Considerable difficulties have arisen upon the construction of this clause of the Letters Patent. We think, however, that we must now consider it as the settled doctrine of this Court that at least one class of suits, besides suits directly for the possession of land situate in the mofussil,—namely, suits for foreclosure of a mortgage of lands so situate,—are excluded by this section, as being "suits for land." No instance has been produced to us in which such a suit has been maintained. On the other hand there are several express decisions that such suits cannot be

maintained ; and the uniform practice of the Court has in our opinion made these decisions conclusive.

It was suggested that Macpherson, J., intended in this case to depart from these decisions in deference to the opinion expressed by Vice-Chancellor Bacon in the case of *Page* v. *Edo* (1), but we have no reason whatever to suppose this to be the case. That decision does not really bear at all upon the question before us, which turns upon the construction of cl. 12 of the Letters Patent, which has been held to exclude from the jurisdiction of this Court any suit which is a suit for land situate in the mofussil.

But acknowledging that it is now settled that a suit for a foreclosure is a suit for land within the meaning of cl. 12 of the Letters Patent, it does not necessarily follow that every suit which has any reference to land is therefore a suit for land within this section. Concurrently with the decision of this Court already referred to, and apparently without any supposed conflict with them, it has been held that a suit to declare that a person resident in Calcutta holds lands in the mofussil subject to certain trusts is not a suit for land within the meaning of cl. 12—*Bagram v. Moses* (2). So also it has been held that this Court has jurisdiction to enforce specific performance of a contract to sell lands situate out of Calcutta made by parties resident in Calcutta (3); and the High Court of Bombay has held that a suit by one shareholder to recover his share of the rents received by the other is not a suit for land, although the title is in dispute (4).

The true nature of the present suit appears to be to enforce the right of the plaintiffs to act in all respects as co-sebais. No possession of any land is claimed, and no decree bearing directly upon land or any interest in land has been given. In fact, as pointed out by the learned Judge, neither plaintiffs nor defendants have any beneficial interest in the land whatsoever. It may be added that in strictness of law they have no lega

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(1) L. R., 18 Eq., 118.

(2) 1 Hyde., 284.

(3) *Ramdhane Shaw v. Sreemutty Nobumoney Dossa*, Bourke's Rep., 218. (4) *Chintaman Narayan v. Madhav Venkatesh*, 6 Bom. H. C. Rep., A. C., 23.

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interest in it either. The ownership of the debutter property is vested in the idols, the sebaitis being, strictly speaking, not trustees for the idols, but managers—*Maharani Shibessourie Debia v. Mothooranath Acharjo* (1)—though there is this peculiarity, that all transactions, including even litigation, are carried on by the managers in their own names. Even, therefore, had this suit been brought in the mofussil, it would have been laid at least as correctly as a suit for a declaration of the plaintiffs' right as co-sebaitis, and for an order that the defendants should admit them to that right, as for possession, and we should be inclined to think that the former is in reality the only correct form of the suit.

Under these circumstances we are not prepared to say that, having regard to the interpretation which has been put upon these words and the similar words in s. 5 of Act VIII of 1859, the learned Judge was wrong in holding that this Court had jurisdiction to try this suit and make this decree.

It was further objected to the terms of the decree that this Court has no power to appoint a receiver and ought not to have directed an account. It has been the practice of this Court, where it is necessary to do so in order to enforce its own decree, to appoint a receiver in respect of landed property situate in the mofussil, and we feel ourselves justified in following that practice. With regard to the account which is directed by the decree, we think that, upon the facts found by the learned Judge, it was right to direct an account. The learned Judge held that Juggodumba Dossee having got into possession about the time the decree of the Court of the 24-Pergunnas was passed, has ever since resisted all attempts made by Puddomoney to exercise her right as sebait. We see no reason to differ from the learned Judge in this finding of fact, and it was admitted that if Puddomoney had been excluded she was entitled to an account.

The result is that in our opinion this appeal ought to be dismissed with costs.

Appeal dismissed.

Attorneys for the appellants: Messrs. Swinhoe, Law, & Co.

Attorney for the respondents: Baboo Joykrissen Gangooly.

Before Mr. Justice Phear.

PUNCHANUN GHOSE v. G. H. DALY AND ANOTHER.

*Principal and Surety—Promissory Note—Receipt of Interest in Advance—
Giving time to Principal.*

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In a suit against *D* and *K* on a promissory note, where *K* raised the defence that he was only a surety for *D*, and that the plaintiff having given time, *D* was released from liability. *Held* that it was necessary to show that the fact that *K* signed the note only as surety for *D* was known to the plaintiff at the time when the note was made. *Held* also that a binding contract to give time to the principal cannot be inferred from the mere receipt by the creditor of interest in advance on the note.

SUIT to recover Rs. 3,000 being the amount of principal due on a promissory note made by the defendants G. H. Daly and G. L. Kemp at Calcutta, on 2nd September 1871, in favor of the plaintiff, and payable to him or order one month from the date thereof. The plaintiff also sought to recover Rs. 514 the balance of interest due on the promissory note at 36 per cent. per annum. The plaintiff stated that he had made several demands for payment of the note, but the defendants had failed to pay.

The defendant. Kemp, filed a written statement, in which he stated that he signed the note at the request of the defendant Daly and only as surety for him, and that the plaintiff took the note with the knowledge that he was only a surety for Daly, to whom all the consideration for the note had been paid. He also stated that the plaintiff, at various times, received interest on the note from the defendant Daly in advance, in consideration of which the plaintiff gave further time for payment of the amount due on the note to the defendant Daly, and that this arrangement was made without his knowledge or consent. He submitted, therefore, he was not liable in the suit.

Mr. W. Jackson and Mr. Macrae for the plaintiff,

Mr. Lowe for the defendants.

The arguments sufficiently appear in the judgment.

PHEAR, J.—In this case both the defendants admit that they

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are the makers of the promissory note upon which the plaintiff sues; and on the part of Dr. Daly, no defence is offered. But Mr. Kemp says that, although on the face of the note he appears as a principal in the contract to pay, yet he was, in fact as between himself and Dr. Daly at any rate, only surety to the knowledge of the plaintiff, and that the plaintiff has given time to the principal debtor. On this ground Mr. Kemp urges, or rather it has been urged on his behalf, that he is in equity discharged from liability.

A defence of this kind, at first sight, does not seem as if it can be right. One signs a promissory note jointly with his friend, in order that the latter may obtain the loan of a sum of money, the money-lender refusing to advance the money without the second name on the note. In consequence of his so signing, the money is advanced, time runs on, the friend pays interest for a while, and next requires pressing for it; then various communications take place between him and the money-lender, who at last, finding that he cannot get his money from that quarter, turns to the second promisor, and he at once says: "Oh! you have been giving time to my friend; equity relieves me from my promise." The unfortunate money-lender on being thus met, may well be excused if the thought occurs to him that the rule appealed to, if operative, must be wrongly designated.

If this case depended upon English law alone, I think, on the materials before me, that the defence would fail.

Many cases of this class arose in the Common Law Courts at Westminster, shortly after the introduction of equitable defences in those Courts by the Common Law Procedure Act. The results of these were reviewed by the Court of Exchequer Chamber in *Greenough v. McClelland* (1), a case very similar, in many respects, to the present, and Williams, J.; in delivering the judgment of the Court, was at much pains in ascertaining the true nature of the rule of equity which was to be applied. The facts were as follows:—

"A person of the name of Titterington, requiring a loan of £150, applied to the defendant upon the subject, and the defendant wrote the plaintiff a letter, requesting him to call on

(1) 6 Jur., N. S., 772; S. C., 2 E. & E., 424.

Titterington, which the plaintiff did. Titterington then asked the plaintiff to lend the £150 to him. The plaintiff drew a cheque for the money, less three months' interest, at the rate of £20 per cent., and gave it to Titterington, and it was duly paid. He also drew out a joint and several promissory note, being the note in question, and gave it to Titterington, telling him to sign it himself, which he did, and to obtain the defendant's signature to it as his surety, and then to return it so signed to him (the plaintiff). This Titterington did, and the plaintiff received the said note accordingly, signed by the defendant as maker. When the note became due, Titterington paid to the plaintiff another three months' interest, at the rate of £20 per cent., and in advance, and received from the plaintiff the following receipt:—

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'£7-10 1859, June 26th.

'Received from Mr. Titterington £7-10 for interest, due, the 26th September next, on his joint note.

'Jas. GARRISON.'

"And on the expiration of that period, Titterington paid to the plaintiff another three months' interest in advance, and received from the plaintiff the following receipt:—

'£7-10 1858, September 26th.

'Received from Mr. Titterington £7-10; for renewal of his joint note to

'Jas. GARRISON.'

the 26th December next.'

"These payments were made without any consent or knowledge of the defendant, and the defendant was not informed, nor did he know of them, until the latter end of October, when Titterington became insolvent. The jury found that the defendant was surety as between himself and Titterington, and that the plaintiff knew that fact, but that he did not agree, nor did the defendant stipulate, that he should be considered or treated by the plaintiff as surety, or otherwise than as maker. The question for the Court was whether, on these facts, the giving of time to Titterington, which was assumed to have taken place, had the effect of discharging the defendant. It was argued, with much apparent reason, that unless the plaintiff, at the time of making the contract, expressly or impliedly agreed that the defendant, although he appeared as

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principal on the paper, should, nevertheless, be regarded only in the situation of surety for Titterington, 'it ought to be matter of indifference to the plaintiff what was in fact the relation between the defendant and Titterington ; but the Court held, on the authorities. that this was not so. The plaintiff was, no doubt, entitled to treat the defendant as maker of the note and a principal debtor, but, nevertheless, as soon as he came to know of his real relation to Titterington, it was fraud on him *to give time to the latter*. Why this should be so, unless the giving of time to Titterington was against the faith of the plaintiff's original agreement with the defendant, it is difficult to see; and Williams J., who delivered the judgment of the Court of Exchequer Chamber, seems to have had some misgiving on this point.

In a later case, *Bailey v. Edwards* (1), the same question was dwelt upon by Blackburn, J., in delivering the Judgment of the Court of Queen's Bench. That learned Judge said:— "Whether, if the matter were *res integræ*, it might not have been better to confine the surety's right in such cases to compensation in damages for this injury, which is generally only nominal, it is not now open to us to consider. A long series of decisions, many of which may be found collected in the notes to *Rees v. Berrington* (2), have settled that such an alteration in the position of the surety discharges him, even though the delay may be shown to be for his benefit. Lord Eldon, in *Samuell v. Howarth* (3), gives, as a reason for the apparent harshness, that 'the law has said that the surety shall be the judge of that, and that he alone has the right to determine whether it is or it is not for his benefit.' "The principle has been imported from the Courts of Equity into those" of law, and is clearly stated by Williams, J., in *Strong v. Foster* (4). After quoting from this case, Blackburn, J., proceeds to say:— "There are authorities, amongst others *Strong v. Foster* (4),—tending to show that, in order to enable a surety to raise *at law* a defence, upon the ground that time has been given to the principal, it is necessary to show that the original contract

(1) 11 Jur., N. S., 134, at p. 136; 8 C. 4 B. & S. 761, at p. 771.

(2) 2 Wh. & Ta. L. Ca. in Eq., 4th Ed., 974.

(3) 3 Mer., 272, at p. 279.

(4) 17 C. B., 201.

between the plaintiff and the defendant was that of creditor and surety. How this may be at law, we are not now called upon to decide. We are determining this case as a Court of Equity. It was decided in this Court, in *Pooley v. Harradine* (1), on an equitable plea, that the equity on which the Court should act 'does not depend on any contract with the creditor, but on its being inequitable in him knowingly to prejudice the rights of the surety against the principal.' By this judgment we are bound even if we did not agree with it as we do. In *Pooley v. Harradine* (1), the plea alleged that the creditor, at the time when he became holder of the bills, as well as when he gave time, had notice of the relationship of principal and surety between the defendant and his co-debtor; and the decision did not go further; but it had previously been determined by Sir J. Leach, M. R., that even though the relationship of principal and surety was created, by an arrangement between them after the parties had become liable to the creditor as joint debtors, the creditor, by giving time to the principal, with notice of this arrangement, discharged the surety; and this decision was affirmed by Lord Brougham and by the House of Lords—*Oaksley v. Paskeller* (2)."

It seems to me clear, however, that *Oaksley v. Paskeller* (2), thus referred to, does not extend so far as Blackburn, J., supposes. Lord Lyndhurst there asks (3) "Can you cite any authority to the effect that two original principal debtors could, by arrangement among themselves, convert one into a surety only for the other principal debtor?" ; and the answer is that the creditor had accepted the arrangement, and the judgment of the House of Lords was moved by Lord Lyndhurst upon that ground.

Also, the opinion of Lord Cottenham, expressed in *Hollier v. Eyre* (4), upon which the Exchequer Chamber relied in *Greenough v. McClelland* (5), does not as it appears to me, support the conclusion drawn from it. He says (6):—

(1) 7 E. & B., 431 ; S. C., 3 Jur., N. S., 488

(2) 4 Cl. & Fin., 207 ; S. C. 10 Bligh, N. S., 548.

(3) At p. 232. 4 Cl. & Fin.

(4) 9 Cl. & Fin., 1.

(5) 6 Jur., N. S., 772; S. C., 3 E. & B., 424.

(6) 9 Cl. & Fin., p 51.

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"The judgment of the Court below proceeded entirely upon the ground that the plaintiff was throughout the whole transaction a surety only. If, therefore, the ground fails, the decree cannot be supported. I am, however anxious to explain my view of the state of the law upon the subject, assuming that the plaintiff was only a surety from the beginning; that is, as between himself and the co-grantors of the annuity; for as between him and the grantees, I think it quite clear that he was a principal grantor. To affect the grantees in that case with any equities arising from the plaintiff being only a surety, they must have had notice of it at the date of the transaction."

This point is dealt with in *Pooley v. Harradine* (1), though the consideration of it was not necessary to the decision of the case, and, consequently, the remarks upon it of Coleridge, J., who delivered the judgment of the Court, amount to nothing more authoritative than opinion upon opinion. These remarks, referring to Lord Cottenham's judgment, are (2):—"That learned Lord uses the expression, 'at the date of the transaction,' which the reporters, in the marginal note of the case, seem to have understood as meaning the date of the original grant; but from the context, and the passages which follow in the same page, we are disposed to understand it as referring to the time of the transaction or dealing alleged to amount to a discharge of the surety."

With the greatest deference to the learned Judge, I cannot help thinking that the reporters were right. It is plain to me, from the context, that the "transaction" spoken of was the original grant. And the words in which Lord Eldon expresses the rule in *Samuell v. Howarth* (3) seem to show that it is the original situation and knowledge of the parties, as in reason it ought to be, which is the foundation of the equity:—"The rule is this, that, if a creditor, without the consent of the surety, gives time to the principal debtor, by so doing he discharges the surety; that is, if time is given by virtue of positive contract between the creditor and the principal—not where the

(1) 7 E. & B. 431; 3 C., 3 Jur. (2) 3 Jur. N. S., 489, & 7 E. & E., N. S., 488.

436.

(3) 3 Mer., 272, at p. 278.

creditor is merely inactive. And in the case put, the surety is held to be discharged, for this reason, because the creditor, by so giving time to the principal, has put it out of the power of the surety to consider whether he will have recourse to his remedy against the principal, or not; and because he, in fact, cannot have the same remedy against the principal, as he would have had under the original contract."

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I may add that it is apparent from the form of the equitable plea in the recent case of *Petty v. Cooke* (1), it is still in practice considered essential in the Common Law Courts at Westminster to allege that the creditor took the note with knowledge of the suretyship.

Notwithstanding, then, the leading common law authorises which I have referred to, and which have been supposed to govern a case like the present, I think the first question which arises before me under English law is, did Mr. Kemp, to the knowledge of the plaintiff when he took the promissory note sign the note only as surety for Dr. Daly?

And the second question is, if so, did the plaintiff afterwards, by positive contract with Dr. Daly, give him time to pay the debt?

I do not think the evidence is sufficient to establish the affirmative of either of these. No doubt the plaintiff knew enough to enable him to make a shrewd guess that Dr. Daly was the person for whose sole benefit the money was borrowed, and, therefore, that as between the two promisors, Mr. Kemp and Dr. Daly, the relationship was probably that of surety and principal. But I think a guess, however well founded, is not sufficient to determine the first question against the plaintiff.

But, however this may be, I think that the second must certainly be found in the plaintiff's favor. There is nothing in the evidence serving to prove that the plaintiff on any occasion ever bound himself, to use Lord Eldon's words, by positive contract, to give time, however short, to Dr. Daly, for payment of the debt. Dr. Daly's answers to the interrogatories afford the only evidence on the point favorable to the defence, and this falls very far short of anything of the kind. The

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endorsement of payment on the back of the promissory note do not help the defendant. And the memoranda by which Dr. Daly speaks were manifestly not made at the times of the payments, and are altogether untrustworthy. But even if they be taken to the letter in confirmation of Dr. Daly's testimony the utmost that is proved is that, on certain occasions, Dr. Daly, in consequence of pressure from the plaintiff, paid him money, not only for arrears of interest due at the time, but also by way of advance of interest for six weeks or two months. It might, no doubt, have been the case that this advance of interest, small as it is, was made as consideration for an undertaking, express or implied, not to sue for the interval to which the advanced interest relates, but I see no indication of this having been so. It may equally well have been only part of the consideration for the plaintiff's forbearing to sue for the principal and interest actually due at the time of the demand. The defendant Daly would not have been pecuniarily prejudiced if the plaintiff had sued next day. It seems to me that a binding contract to give time cannot be rightly inferred from the mere receipt by the creditor of interest in advance; and this was the view of the Court of Exchequer, expressed in the case which I lately quoted in *Dwarkanath Mitter v. Daly* (1).

(1) *Before Mr. Justice Phear.*

The 7th and 8th July 1875

DWARKANATH MITTER v. G. H.
DALY AND ANOTHER.

DWARKANATH MITTER v. A. J. C.
BIRCH.

*Principal and Surety—Promissory
Note—Receipt of Interest in Ad-
vance—Giving time to Principal.*

The mere taking, by the holder of a promissory note, of interest in advance from the principal debtor does not operate as an agreement not to sue during the time covered by the interest, and therefore does not constitute such a giving of time to the principal as would release the surety.

THERE were two suits on a promissory note in the following form, made

by the defendants in favor of the plaintiff, and dated 28th September 1871.—“Three months after date, we jointly and severally promise to pay to Baboo Dwarkanath Mitter, or order, the sum of Rs. 3,000 for value received.”

(Sd.) G. H. DALY,

A. J. COLVINE BIRCH.

GEO. G. NELSON.

The two suits were heard together by the order of the Court; the first having been brought during Birch's absence in England, and the second on his return.

The further material facts are stated in the judgment.

I therefore think that, on the ground of English law, the plaintiff is entitled to a decree against both defendants.

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Mr. Branson and Mr. W. Jackson
for the plaintiff.

undertaking of the sort ever came to their knowledge. I am quite willing to accede to Mr. Lowe's argument that these persons are worthy of very little credit indeed. There can

M. Lowe for the defendants.

PSEAR, J.—It is not disputed that the defendants executed the promissory note on which the plaintiff sues, and in the case of Dr. Daly no defence is set up. But with regard to the other two defendants (I treat the two cases as if they were one, for they have been heard together by order of the Court), it is said that they,—that is Nelson and Birch,—only signed the note as sureties for Daly, and that the plaintiff has so given time to Daly that they are not in equity liable to be sued.

be no doubt that in this case there has been an attempt made by the plaintiff and Khetternath to falsify facts in such a way as to make it appear that Khetternath was entirely independent of, and not in the slightest degree the agent of the plaintiff as between the plaintiff and the makers of this note. It seems to me very plain that Khetternath is really the confidential servant of the plaintiff, and that he was not in this matter a mere bazar dalal. But however this may be, I repeat that these persons positively

swear that they had no knowledge that Nelson and Birch only signed this note upon the condition of being sureties, and there is very much to support this assertion, because it does not seem to be pretended that there was any communication of any sort between the plaintiff or Khetternath and these gentlemen. According to Khetternath's account, they were sent for by Dr. Daly. They were told that their signatures were wanted, and, at his request, they signed the note. Nothing was said as to their being anything other than the principals, which they appear to be on the face of the note, and, however untruthful Khetternath may be as to some of his statements, he was not cross-examined upon this point at all. It then stands upon the evidence that Capt. Nelson and Capt. Birch did nothing, when the note was signed, to represent that they signed in the character of sureties, and not in the

Now, all three defendants appear on the written document itself as principals, and I need hardly say that, in order to get Nelson and Birch into the situation of sureties, it is not enough to prove that the parties, defendants, agreed among themselves that it should be so, but it must be made out that Nelson and Birch signed the note upon this understanding, and that the plaintiff took the note with these signatures, knowing that they had so intended to sign. If this were made out, then, no doubt, the plaintiff would be held in equity to have assented to the defendants, Nelson and Birch, being liable only in the alternative as sureties to the principal, Daly. It appears to me, however, upon the evidence which has been adduced before the Court, that the defendants Nelson and Birch have failed to make out that this was the case. The plaintiff and his witness Khetternath absolutely deny that any

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I had arrived at the foregoing conclusions, and put my reasons on paper, when my attention was drawn to the recent enactment

character of principals. Dr. Daly, no doubt, says that he was the person who was borrowing, and I may take it that the plaintiff was perfectly well aware that Daly was the man who wanted money. Daly also says that his friends only signed as his sureties, and that the plaintiff knew this was the fact. When he is asked how he knows it, he gives as his reason that he told Khetternath that he was the person who was borrowing. He does not go so far as to say that he told Khetternath that if the names of Nelson and Birch were put upon this note as jointly with his, they would be put there only as sureties, or anything equivalent to that; and, no doubt, the two names were added to Daly's because the plaintiff would not agree to lend to Daly alone. I see, therefore, nothing in the evidence to lead me to the conclusion that in equity the defendants Nelson and Birch, though in fact, they appear as principals on this note, ought to be treated as only sureties for Daly.

But even if I had thought otherwise, and if I had been of opinion that Nelson and Birch are entitled to such advantage as they might get in this matter from being sureties only, and not principals, I should find it almost impossible to come to the conclusion that the rest of the defence was made out, viz., that the plaintiff had given time to the principal.

The note upon which the suit is brought is a promise to pay on the expiration of three months, and it is said that, on the expiration of those three months, the plaintiff took a three months' advance of interest from the defendant Daly, and in that

way gave him time; and that when those three months had expired, a further advance of interest for three months was made, and that so, in the same way, time was given again, and, I think, this was said to have happened several times to the end of 1873.

Now, in order to constitute a giving of time, such as to release the surety, there must be an obligation in law or equity upon the creditor preventing him from suing the debtor during the time which is supposed to be given. But I do not understand that the taking of interest in advance alone of itself operates as an obligation upon the creditor to refrain from suing his debtor. If he sues, the debtor will have the benefit of having paid that money. There is nothing in the transaction itself to alter the situation of the parties. It would be otherwise if the creditor obtained the advance from his debtor upon the distinct representation that he bound himself not to sue for the time in respect of which the interest was advanced. In that case, of course, there would be a binding agreement between the parties, which would be effective both in law and in equity, to prevent the creditor from suing; and this, I imagine, was the case in all the instances which are cited in support of the defendant's contention, with the single exception of a case in this Court—*Kali Prasanna Roy v. Ambica Charan Bose* (a). In that case a decision was given by an Appeal Bench of this Court, which seems, no doubt, to have the effect of laying down that the mere facts of payment of interest in advance, for however

of the Indian Contract Act, 1872; and certainly the matter in this country seems to be put beyond all doubt by s. 132 of that

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might a period, would, in equity, bind the creditor who received it, not to sue during that period. With the greatest deference to the learned Judges who decided that case, I cannot arrive at that opinion. The cases which are cited in support of it seem to me to fall very far short of it indeed. My learned colleague, Markby, J., says:—"Bearing in mind, and applying the principle as it is explained in *Samuel v. Howarth* (a) and *Strong v. Foster* (b) and, I must say, as it seems to me, though perhaps, not quite so clearly in *Oakeley v. Pashel-*

lor (c) also, there is, I think, little difficulty in disposing of the present case. The creditor had accepted interest in advance from the principal debtor, and he had thereby not only put it out of his own power to sue the principal debtor for a certain period, but had also put the principal debtor in a position in which it would be a hardship that he should be sued by any one at all during that period."

I must confess that I am unable to see that the mere acceptance in advance of interest of itself puts it out of the power of the creditor to sue the principal debtor; and I think that all the cases cited contained other facts which, taken with that fact, amounted to an agreement not to sue. The whole principal lies in a very small compass. If the creditor has bound himself by an agreement with the principal debtor so that he cannot sue, the surety paying off the debt would not be put in the position of being able to recover from the principal. It appears to me that the mere payment of interest in advance, such

as has been made in this case, does not of itself constitute a binding contract on the part of the creditor not to sue, and that the sureties, if they had paid the debt, might, notwithstanding that advance of interest have at once sued the principal and recovered, giving credit, of course, for the amount of interest which had been advanced.

It, perhaps, would have been necessary for me, holding this view, to have referred the case to a Full Bench, if it had not been for the case of *Rayner v. Fussey* (d) cited to me by

Mr. Branson which seems to be almost entirely paralld to the present case, and which was not cited before the Appeal Bench in the case of *Kali Prasanna Roy v. Ambica Charan Bose* (e). I may add that the so-called giving of time, which has occurred successively on a series of occasions in the present case, was nothing more than the same giving of time i. e., taking interest in advance, which occurred at the inception of the contract itself. In other words, it was a continuation of the same contract. It would be, to say the least of it, very remarkable, if this alone had the effect of putting an end to the liability of the sureties.

I think there must be a decree for the amount of the note against the defendants in each suit, with costs on scale No. 2, including the cost of the interrogatories to Dr. Daly. There will be only one set of costs from the date of the order that the two suits should be heard together, interest at 6 per cent, will run on the amount of the decree.

(a) 3 Mer., 272.

(b) 17 C. B., 201

(c) 10 Bligh, N. S., 548; S. C., 4 Cl. & Fin., 207.

(d) 28 L. J., Ex., 132.

(e) 9 B. L. R., 261.

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Act, taken together with its illustration. This runs as follows :—
“ Where two persons contract with a third person to undertake a certain liability, and also contract with each other that one of them shall be liable only on the default of the other, the third person not being a party to such contract, the liability of each of such two persons to each third person under the first contract is not affected by the existence of the second contract, although such third person may have been aware of its existence.”

“ *Illustration.*—A and B make a joint and several promissory note to C. A makes it, in fact, as surety for B, and C knows this at the time when the note is made. The fact that A, to the knowledge of C, made the note as surety for B, is no answer to a suit by C against A upon the note.”

The result is that the plaintiff is entitled to a decree against both defendants for the amount of the note, with interest thereon, according to the terms of the note, from 25th September 1873 to the date of the plaint. I trust Dr. Daly's statement as to the time when the last payment of interest was made in preference to the testimony of the plaintiff on the point, because I do not think the plaintiff was in all respects truthful in the evidence which he gave.

The plaintiff must have his costs on scale No. 2, but I give no interest after decree.

Judgment for plaintiff.

Attorney for the plaintiff: Baboo Kedernath Mitter.

Attorneys for the defendants: Messrs. Berners, Sanderson, and Upton.

APPELLATE CIVIL.

Before Mr. Justice Macpherson, Officiating Chief Justice, Mr. Justice Jackson, and Mr. Justice Glover.

1875
June 23.

THE COLLECTOR OF CHITTAGONG (DEFENDANT) v. KALA BIBI
(PLAINTIFF).*

*Beng. Act IV of 1870, s. 75—Sale for Arrears of rent—Power of Collector—
Tenure created under Court of wards—Previously existing Tenure—*

The provisions of s. 75 of Beng. Act IV of 1870 apply only to tenures created by the Collector during the time the estate has been in the hands of the Court of Wards, and not to tenures created previously. A Collector, therefore, has no power to sell for arrears of rent a tenure created before he took charge of the estate without previously obtaining a decree for such arrears in the regular way.

THE plaintiff owned a talook in a Government zemindari called the Nowabad Mehal, for which she paid rent to one Moulvi Abdool Rouf, who had an ijara of the same. After the death of Abdool Rouf the ijara came under the charge of the Court of Wards as the property of the minor son of Abdool Rouf. The plaintiff's talook was sold by the Collector for arrears of rent for the years 1275 and 1276, B. S. (1868-69 and 1869-70). The plaintiff, brought this suit to set aside the sale on the grounds, first, that the arrears had been paid to the Collector's karpardaz, and, secondly that the sale was illegal and irregular; that it was made without her knowledge; that there had been no notice given of the arrears said to be due, and no proclamation of sale published as required by the law.

The Collector in his written statement said that it did not appear from his books that rent for 1275 and 1276 had been paid; that there had been due notice issued and publication of

* Appeal, No. 1 of 1875, under s. 15 of the Letters Patent, 1865, against a judgment of Markby, J. (Mitter, J., differing in opinion), dated 6th march 1875, in Special Appeal, No. 879 of 1874, from a decree of the Subordinate Judge of Zilla Chittagong, dated the 24th January 1874, reversing a decree of the Munsif of Satkhira, dated the 15th September 1873.

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the sale proclamation, and he said—"the talook has been sold by public auction under the provisions of Act XI of 1859, inasmuch as the provisions of the said Act have, under s. 75 of Beng. Act IV of 1870, been applied to sales in respect of the landed properties under the Court of wards." The auction-purchaser, who had been made a defendant, also defended the suit.

The Munsif held that, with the exception of some witnesses on the part of the defendants who spoke in general terms as to the issue of notice and the publication of the sale proclamation, there was no evidence that any notice issued to the plaintiff or that the sale proclamation was published as required by the law; nor were the reports of the peon who carried the same or of the Nazir filed. He also held that the plaintiff had not adduced satisfactory evidence of the payment of rent by her, but that, as the sale was illegal and irregular, it ought to be set aside. He accordingly decided in favor by the plaintiff. The Collector alone appealed from this decision, and the Subordinate Judge reversed it, holding that the sale was properly held after due issue of notice and proclamation.

From this decision the plaintiff preferred a special appeal, which was heard before Markby and Mitter, JJ., and among other grounds it was argued that the procedure adopted by the Collector was wrong, and that he should have brought a regular suit in the usual way to recover the arrears due, instead of selling the talook at once under the provisions of Act XI of 1859 and s. 75 of Beng. Act IV of 1870, inasmuch as it was not Government property. The appeal was disposed of on the 21st of December 1874, but this question was reserved for further consideration, and on the 6th of March 1875 the learned Judges delivered the following judgments :—

MARKBY, J.—With regard to the question which we reserved in this case namely, whether the Collector could, under s. 75 of Beng. Act IV of 1870, proceed for the recovery of the rent due from the defendant as if it were an arrear of revenue, I think that he cannot.

S. 75 provides that "farmers and others holding tenures in estates in charge of the Court direct from the Collector shall

be subject to the same Rules, Regulations, and Acts as are applicable to other persons holding similar tenures and interests under Collectors of the land revenue; but when the farm is held from the manager, these Rules, Regulations, and Acts shall not apply."

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It appears that the defendant in this case held a tenure under one Mouvi Abdool Rouf; and that on the death of the latter the estate descended to his minor son. The son was made a ward of Court; and the Collector took charge of his property, no manager being appointed.

Under these circumstances, I do not think the defendant "holds a tenure direct from the Collector." I think those words are meant to describe tenures which the Collector has himself created during his management under his powers as manager. Tenures so created are described as being held "under the Collector" in Regulation VI of 1822; and it is a reasonably accurate, though not a technically accurate, description of such tenures to say that they are held under or from the Collector; whereas to call the tenure of this defendant a tenure held from the Collector would appear to me to be altogether inaccurate.

There is no doubt that, under Regulation VII of 1799, s. 25, the Collector had the same powers in respect of tenures in a ward's estate existing when he took over the management, as in respect of tenures created by himself, but the words there are different, and those powers no longer exist. The only powers which now exist in respect of tenures in a ward's estate are under Regulation VI of 1822 and Beng. Act IV of 1870, s. 75. It is only through one or other of those two provisions that Beng. Act VII of 1868, relating to summary methods of recovering arrears of revenue and other public demands, can be made applicable; and both these provisions apply, in my opinion, only to persons holding under tenures created by the Collector himself; and it is not to me any matter of surprise that the powers conferred by Regulation VII of 1799, s. 25, should have been curtailed. It is a strong proceeding to apply to the recovery of private demands the machinery which was specially intended for the recovery of public demands. But it would be scarcely reasonable to give a Collector such summary powers in respect of

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claims as to the justice of which he would very often be unable to form any opinion, except upon such information as he could obtain from the proprietor's own private accounts, and the servants upon the estate. It seems to me scarcely probable that in these days the Legislature intended that a private demand should be capable of being enforced under such circumstances. Where the Collector has created the tenure himself, and the whole is a matter of record in his own office, it may not be quite so unreasonable to give him these summary powers, though I confess I scarcely see how it can even then be justified; and I should certainly not be disposed to extend such a power a step beyond the express and positive words of the law.

For these reasons I think the wrong procedure has been adopted in this case, and that the Collector had no power to take proceedings under Beng. Act VII of 1862; but that he was bound to recover the arrears in the usual way. The sale was, therefore, altogether illegal and must be set aside. The decree of the Munsif appears to be correct. The decree, therefore, of the Subordinate Judge will be reversed, and the decree of the Munsif restored with costs.

I have further to add that I express no opinion as to what would have been the proper procedure had Beng. Act VII of 1868 been applicable.

MITTER, J.—As regards the question reserved by us, I am of opinion that the procedure adopted by the Collector to bring the plaintiffs tenure to sale is the right procedure. I think that the tenures mentioned in s. 75 of Beng. Act IV of 1870 should not be limited to those only that are created during the management of the Court of Wards. It is true that the expressions used in this particular section are not very accurate. But this inaccuracy is not cured by giving to it this limited operation. It is as incorrect to say of the tenures for the first time created by the Collector as manager of the ward's estate that they are held from the Collector, as it would be to use the same expression with reference to old tenures. It seems to me that the construction which we ought to put upon this section is that where the management of the ward's estate is vested in the

Collector, he would be competent to proceed against the defaulting tenants of all description in the ward's estate in the same manner as he could have done if they were tenants of Government khas mehals.

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That this was the law in 1799 is clear from s. 25 of Regulation VIII of that year. The same provision was also re-enacted in cl. 2, s. 3 of Regulation VI of 1822, and the language used in this latter clause has been adopted with slight modifications in s. 75 of Beng. Act IV of 1870.

For these reasons I would confirm the judgment of the lower Appellate Court, and dismiss the special appeal with costs.

The learned Judges thus differing in opinion, the judgment of Markby, J., as the Senior Judge prevailed.

The Collector appealed under s. 15 of the Letters Patent.

Baboo Annodda Persad Banerjee, for the appellant:—Ss. 25 and 26 of Regulation VII of 1799 show that tenures of all descriptions, whether created by the Collector himself in the course of his management of the estate of a ward, or whether they had been in existence before the estate came under the Court of Wards, were to be dealt with in the same way as tenures in a khas mehal. Regulation VI of 1822, s. 3, cl. 1, authorizes Collectors to grant farms or to make other arrangements of estates of wards under the Court of Wards. Cl. 2 lays down that farms and other tenures may be sold under the same processes for the recovery of rent as are applicable to the case of tenures held under a Collector in a khas mehal. S. 75 of Beng. Act IV of 1870 is a re-enactment of Regulation VI of 1822, s. 3, cl. 2, which was repealed by s. 86 of this Act. Act IV of 1870 is a consolidation of all previous enactments relating to the Court of Wards, with certain modifications and alterations. Markby, J., considers that cl. 2, s. 3, Regulation VI of 1822, refers to tenures mentioned in cl. 1, and not to all classes of tenures in a ward's estate, but the words in cl. 2 are general, and are not restricted to any particular class of tenures. It is admitted by Markby, J., that under s. 25 of Regulation VII of 1799, all classes of tenures, whether created by the Collector or otherwise, may be sold by the same process, and there is nothing to show that the Legislature, in enacting s. 75 of

1875 **Beng. Act IV of 1870**, intended to alter the practice which had been followed for seventy years. The tenant is not placed in a worse position by the procedure adopted in this case; he can always bring a regular suit to show that he is not in arrear, and it is immaterial whether he is a plaintiff or defendant since the onus of proving payment of rent is always on him. This procedure can be adopted only when the management is in the hands of the Collector himself, who is a public officer. Obviously that is the reason for entrusting him with the powers, instead of taking the circuitous mode prescribed for private individuals. The words of s. 75, "but when the farm is held from the manager, these Rules, Regulations and Acts shall not apply," clearly point to a distinction between the Collector and a manager. If we were to suppose that "tenures in estates in charge of the Court of Wards direct from the Collector" means "tenures created by the Collector" only, then "similar tenures and interest" must be construed to mean "tenures created by the Collector" only, but it is not disputed that all tenures in a khas mehal without distinction may be proceeded against in the same way for arrears.

The respondent was not represented.

The judgment of the Court was delivered by

MACPHERSON, J.—In this case I think that the conclusion at which Markby, J., has arrived is right. The tenure, with reference to which the question arises, was in existence before the Collector took charge, having been created before the death of the proprietor to whom the minor, whose estates are now in charge of the Court of Wards, succeeded as heir. It is clear, according to the ordinary principles of justice and equity, that the position of the tenant ought not to be in any way damnified or altered by the simple fact that the present proprietor is a minor, unless the law expressly says that it shall be so. The question is whether the law does expressly declare anything of the kind.

It seems to me that it does not. The section on which the Collector relies, viz., s. 75 of Beng. Act IV of 1870 refers only to farmers and others holding tenures "direct from the Collector."

The tenure, the subject of suit cannot, in my opinion, be said to be held "direct from the Collector" seeing that it was in existence before the Collector even had charge of the estate. Markby, J., was right in reading s.75 as applying only to tenures created by the Collector during the time that the estate has been in the hands of the Court of Wards. A tenure created by the Collector would no doubt be held direct from him : and being so created there would be nothing inequitable in applying to it the provisions of s. 75.

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COLLECTOR OF
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The last clause of the section shows that the construction which I adopt is right. That clause declares—"when the farm is held from the manager, these rules, &c., shall not apply." The distinction thus drawn between farms "held from the manager" and farms "held direct from the Collector" proves that the whole section was meant to apply exclusively to farms and tenures created during the management of the Court of Wards. For the intervention of a manager between the farmer and the Collector would not, in the case of a farm created before the Court of Wards took charge, cause the farm to be either more or less directly held under the Collector, nor would it be any reason why one set of rules, &c., should be applicable, rather than another, though it would be otherwise in the case of farms created under the management of the Court of Wards by the Collector and by a manager respectively.

S. 75 evidently takes the place in the new Act of the second clause of s. 3 of Regulation VI of 1822. The first clause of s. 3 may be found reproduced with modifications in s. 9 and other sections of Beng. Act IV of 1870. But reading the two parts of s. 3, Regulation VI of 1822 together, it cannot be doubted that they both of them applied only to farms and other tenures created under the Court of Wards. That this was so strengthens as in the view we now take of the effect of s. 75.

I therefore think that this appeal should be dismissed, and that the decision of Markby, J., should be affirmed.

Appeal dismissed.

1875
May 11.

Before Mr. Justice Macpherson, Officiating Chief Justice, and Mr. Justice Lawford.

**SHURRUT CHUNDER alias BHOLANATH CHUTTOPADHYA (PLAINTIFF) v.
RAJKISSEN MOOKERJEE AND OTHERS (DEFENDANTS).***

*Act XL of 1858, s. 18—Sale by Guardian without Sanction of the Court—
Invalidity of Sale—Refund of Purchase-Money.*

A sale of a minor's immoveable property by a guardian appointed under Act XL of 1858, and who was also the kurta of the joint family of which the minor was a member, is invalid if made without [the sanction required by s. 18 of that Act even though the sale may have been for the benefit of the minor and made in good faith to pay off the debts of the ancestor:

Where, however, it was found that the purchaser had acted *bona fide*, and had paid a fair price for the property, he was held entitled to a refund of so much of the purchase-money as had been expended for the benefit of the minor.

THIS was a suit to set aside a sale and recover possession of property sold during the plaintiff's minority. He stated that he was one of the three sons of Chunder Cumar Chatterjee, deceased; that, during his minority, his elder brother Ashootosh, who had obtained a certificate under Act XL of 1858, as guardian of him and his younger brother Kamikha Nath, fraudulently, without legal necessity, and improperly, sold their patni talook Kanaipore; and that hearing of this when he attained his majority, he brought his suit to set aside that sale and recover possession of his share.

Ashootosh, the elder brother and late guardian, did not appear, and the suit was defended only by the purchaser, Baboo Rajkissen Mookerjee, who alleged that the property was sold for a high price; that the sale was made to pay off their father's debts; and that the plaintiff had benefited by the sale.

The Subordinate Judge dismissed the suit, holding that the sale was valid; that it was *bona fide* and made in the interest of the plaintiff.

The plaintiff on appeal contended that the sale was not valid,

* Special Appeal, No. 2029 of 1874, against a decree of the Judge of Zilla Hooghly, dated the 30th of June 1874, affirming a decree of the First Subordinate Judge of that district, dated the 19th May 1873.

because it was made without the permission of the Court which appointed Ashootosh guardian under Act XL of 1858; that the alienation was without legal necessity and to the injury of plaintiff's estate; and that the finding of the lower Court was against the weight of evidence.

The Judge, however, found that the purchaser did not act fraudulently, that he gave a fair price, and that the condition of the estate necessitated a sale. He accordingly dismissed the appeal.

From the Judge's decision the plaintiff preferred this appeal.

Babeo Rask Rehari Ghose for the appellant.—A guardian appointed by the Court under Act XL of 1858 has no power to convey property belonging to the minor without the sanction of the Court previously obtained. In the face of this restriction put upon his power by the law, he cannot pass a good title to the purchaser. The *bona fides* of the transaction cannot render the law nugatory. In the matter of the petition of *Busunto Coomar Ghose* (1) there is an expression of an opinion that a

(1) *Before Mr. Justice L. S. Jackson and Mr. Justice Glover.*

The 24th of March 1870.

IN THE MATTER OF THE PETITION
OF BUSUNTO COOMAR GHOSE.*

Act XL of 1858, s. 18—Sale made by Guardian without the sanction of the Court—Grounds for Recall of Certificate.

Where a guardian, appointed under Act XL of 1858, mortgaged certain immovable property of the minor without obtaining the sanction of the Court under s. 18 of that Act, and it appeared he was related to and jointly interested with the minor in the management of the property, held, that it was not a sufficient cause to recall the certificate, unless it was made clear that in the mortgage transactions he had acted in bad faith or had injured, or was likely, or had intended, to injure the interests of the minor.

In this case a certificate of guardianship under Act XL of 1858, granted to Raja Brojendro Narain Haj was, on the petition of *Busunto Coomar Ghose*, recalled, on the ground that he had, without the sanction of the Court under s. 18 of the Act executed a bond in his character of guardian in favor of *Doorga Bibee*, by which certain property of the minor was mortgaged. From the order recalling the certificate *Raja Brojendro Narain* appealed.

Babeo Mohini Mahan Roy for the appellant.

The following judgments were delivered:—

JACKSON, J.—It seems to me that the Judge has, without sufficient cause recalled the certificate granted under Act XL of 1858 to the appellant

* Miscellaneous Regular Appeal, No. 34 of 1870, against an order of the Judge of Zilla Moorshedabad, dated the 11th of December 1869.

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mortgage by a guardian of the minor's property made without previous sanction of the Court would not be valid. Such a conveyance would not be valid any more than a conveyance by a manager of the property of a lunatic under Act XXXV of 1859, which contains a similar restriction—*The Court of wards v. Kupulmun Sing* (1).

Baboo Mohesh Chunder Chowdhry for the respondents.—The guardian in this case was not simply a guardian appointed by the Court; he was the karta of a joint Hindu family who, by Hindu law, has the power to deal with his younger brother's property, provided he acts in good faith and for the benefit of the minor and the alienation is for a necessity. Under these circumstances, the Court will protect an honest purchaser for value by upholding the sale. By taking a certificate, the powers of a natural guardian under the Hindu law are not

The appellant is himself a co-sharer, being the half-brother of the minor. The certificate has been recalled on the ground of a bond entered into by the appellant, by which certain joint immoveable property was pledged to one Doorga Bibee, such bond being executed without the permission of the Civil Court.

The Judge observes that such execution of the bond is a direct violation of the provisions of s. 18, Act XL of 1858. No doubt it is a violation of that section, in so far as that the bond so executed without an order of the Civil Court would be invalid. It does not follow however that because a person has executed a bond which would have no legal force, he must therefore be removed from the guardianship to which he has been appointed. It should have been made clear, I think, that the guardian, in so executing the bond, acted in bad faith, or had injured, or was likely, or intended, to injure the interests of the minor. It does not appear even

that he knowingly contravened the terms of that section, and, at any rate it appears that the bond in question was executed four or five years ago, and that it has been superseded by a patni settlement entered into by the guardian with full sanction of the Civil Court.

It appears to me therefore, that the Judge had no sufficient ground for setting aside the certificate.

It seems to me that there ought to be specially good cause made out before removing from the office of guardian and manager of minors' estates a person who is himself jointly interested with the minor in the management of the property. I think, therefore, that the order of the Judge must be set aside with costs.

GLOVER, J.—I also think that the Judge has taken too narrow a view of the circumstances of the case, and I think no sufficient cause has been shown for recalling the certificate granted to the manager.

crippled. Under somewhat similar circumstances the Court, in *Alfootoonnissa v. Goluck Chunder Sen* (1), declined to disturb a

(1) *Before Mr. Justice Markby and Mr. Justice Romesh Chunder Mitter.*

The 23rd April 1874.

**ALFOOTOONNISSA (PLAINTIFF) v. GOLUCK CHUNDER SEN AND ANO-
THERS (DEFENDANTS).***

Act XL of 1858, s. 18—Sale by Guardian without Sanction of the Court.

Where a guardian had mortgaged certain property of a minor without previously obtaining the sanction of the Court under s. 18 of Act XL of 1858, but it was found that the mortgage transaction was a proper one, and there had since been a decree in a suit in which the minor was properly represented under which the property had been sold, the irregularity as to the mortgage being made without the sanction of the Court was not allowed to prevail.

Suit for a declaration of right to, and for possession of, a share in certain immoveable property, which the plaintiff alleged had been alienated improperly by her mother, who had been appointed her guardian under Act XL of 1858. The plaintiff alleged that her mother had, during her minority, executed a bond in favor of Gopaul Chunder Sen, one of the defendants, by which the property in question was mortgaged, and subsequently sold under a decree obtained in a suit on the bond; that the sale was made without any pressing necessity, and that it was invalid, as having been made without the sanction of the Court under s. 18, Act XL of 1858.

The defence was (*inter alia*) that the plaintiff had been a party to the suit on the bond through her mother

and guardian, and as the present suit was virtually to set aside the proceedings in execution of the decree in that suit, the suit would not lie: and that the sale was a *bond fide* one and valid, notwithstanding the omission to obtain the sanction of the Court.

The Munsif found that there was a sufficient necessity to justify the sale, and that the plaintiff had failed to prove fraud or collusion. He accordingly dismissed the suit.

The Judge held that there was nothing to support the charge of fraud and collusion; that the alienation had been made for pressing necessity and for the benefit of the estate; and that the fact that the sale took place without the sanction of the Court though an irregularity, was not sufficient to make the sale invalid as against the purchaser. He confirmed the decision of the Munsif.

From this decision the plaintiff appealed to the High Court.

Baboo Rama Churn Banerjee for the appellant.

Baboo Kally Mohan Dass for the respondents.

The judgment of the Court was delivered by

MARKBY, J.—We think that the District Judge has disposed of this case rightly, and has given very clear and satisfactory reasons for his decision. The District Judge considers that there was an irregularity in consequence of the guardian not having

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* Special Appeal, No. 1193 of 1873, against a decree of the Judge of Zilla Tipperah, dated the 18th March 1873, affirming a decree of the Munsif of Boodharam, dated the 30th of August 1871.

1875

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mortgage by a guardian notwithstanding the sanction of the Court had not been obtained. The object of the law is merely to secure *bona fides* on the part of the guardian in dealing with the property of the minor; and in the present case both the lower Courts have found that the sale was *bona fide*.

The judgment of the Court was delivered by

MACPHERSON, J.—There is but one point raised in this special appeal. The plaintiff seeks to set aside a sale made during his minority by his elder brother Ashootosh Chatterjee, who was his guardian appointed by the Court under Act XL of 1858.

The Court below has found that the purchaser (the respondent) did not act fraudulently in the matter; that he gave a fair price; and that the condition of the estate necessitated a sale. The question is whether such a sale is bad, and can now be set aside for the one reason that the sanction of the Court, which s. 18 of Act XL of 1858 declares necessary, was never obtained.

S. 18 enacts that every person to whom a certificate shall have been granted “may exercise the same powers in the management of the estate as might have been exercised by the proprietor if not a minor; and may collect and pay all just claims, debts and liabilities due to or by the estate of the minor. But no such person shall have power to sell or mortgage any immoveable property, or to grant a lease thereof for any period

obtained the sanction of the Court under s. 18 of Act XL of 1858 before this property was mortgaged. But I think he very rightly points out that inasmuch as the mortgage transaction was a proper one, and there has been since a decree in a suit in which the minor was represented under which this property has been sold, the objection on the ground of that irregularity ought not now to prevail.

As regards the other point, namely, that the evidence of the debt for which the property was mortgaged

was not admissible, we think that objection cannot prevail. But in saying this we must not be understood as expressing any opinion that that point is open for enquiry in this case. It was found (and no doubt rightly found) that the minor was properly represented in the suit in which a decree was obtained against the minor upon this mortgage, and such a decree under ordinary circumstances would be conclusive.

The special appeal will be dismissed with costs.

exceeding five years, without an order of the Civil Court previously obtained." This is not a simple direction that the sanction of the Court shall be obtained. It is a positive declaration that, in the absence of such sanction, the guardian has no power to sell. If the guardian, having no power to sell, does sell, does he pass a good title to the estate? All persons being presumed to know the law, it must be presumed that the purchaser took with knowledge that, except with the sanction of the Court previously obtained, the guardian had no power to sell to him.

We have been able to find only three cases reported which bear at all upon the question, and in no one of them is it actually decided (1).

The first is *In the matter of the petition of Busunto Coomar Ghose* (2), where, the matter not arising for judicial decision, it is said by Jackson, J., that the guardian in granting a mortgage of the minor's property acted in direct violation of s. 18 of Act XL, and that the mortgage so executed without the order of the Court would be invalid.

The Court of Wards v. Kupulmun Sing (3) was a case under the Lunatics Act, XXXV of 1858. The words in s. 14 of that Act are the same as those in s. 18 of Act XL of 1858,—that the manager shall not have power to sell or mortgage without an order of Court previously obtained. Referring to this section, Phear and Morris, JJ., have declared that, without the sanction of the Court, the manager can pass no good title.

A Division Bench in *Alfootoonnissa v. Goluck Chunder Sen* (4) declined to disturb a mortgage made by a guardian without sanction. But this was after a suit (to which the minor was a party) had been brought on the mortgage, and a decree had been given in favor of the mortgagee.

However much we may desire to support a purchaser who has not acted dishonestly, and by whom a fair price has been paid, we think it impossible to declare a sale valid which is made by a guardian without the sanction which s. 18 requires. The words are very strong. It is not merely that they contain a

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(1) See also the observations of Markby, J. in *Gopalnarain Mozoomdar v. Muddomutty Gupte*, 14 B. L. R. 21, at p. 29.

(2) *Ante*, p. 351.

(3) 10 B. L. R., 364.

(4) *Ante*, p. 353.

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direction that the sanction of the Court shall be obtained: they say without an order of Court previously obtained the guardian shall absolutely not have the power to sell. It seems to us we are bound to treat the sale as made by one having no power in the matter, and therefore as bad. The purchaser who, knowing that he is dealing with a guardian, chooses to ignore the provisions of the Act, has no one but himself to blame if he suffers from the consequences of his negligence.

As, however, the lower Court finds that the conduct of the purchaser was not dishonest, and that he paid a fair price, we shall declare that the plaintiff is entitled to be restored to possession with mesne profits on his repaying to the purchaser so much of the money paid by the purchaser as has been applied to the benefit of the minor's estate. The purchaser on being repaid so much as shall be found to have been applied for the benefit of the minor with interest at 6 per cent. on the money so paid, must give up possession to the plaintiff, accounting for the mesne profits for the time he has been in possession.

The decrees of the lower Courts are set aside, and the suit must go back to the Court of first instance in order that the necessary inquiries may be made, and accounts taken in order to the carrying out of the directions we now give

We may add that we do not think that the position of the purchaser (respondent) is in any way stronger by reason of the accident that the guardian appointed under Act XL of 1858 happened also to be the elder brother and natural guardian (i such he really was) of the plaintiff. Having been appointed under Act XL of 1858, he could not longer act for the minor otherwise than under his appointment by the Court. If one who is the natural guardian, is appointed by the Court, and act under the appointment, he can have no powers other than the given him by Act XL of 1858.

The appellant will get his costs of this appeal and in the lower Courts.

Appeal allowed.

APPELLATE CIVIL.

Before Mr Justice Markby and Mr. Justice Morris.

MAHOMED ARSAD CHOWDHRY (ONE OF THE DEFENDANTS) v. YAKOOB
ALLY (PLAINTIFF).*

1875
June 8.

*Limitation—Minor, Purchaser from—Representative—Act IX of 1871
s. 7—Act XIV of 1859, s. 11.*

Whatever may have been the effect of s. 11 of Act XIV of 1859, as to extending the privilege given to a minor to his representative, s. 7, the corresponding section of Act IX of 1871, limits the privileges to the minor himself and his representative after his death; and therefore a purchaser from a minor cannot claim the benefit of that section.

Suit to recover possession of an elephant or the value thereof and damages.

The plaintiff alleged that the elephant originally belonged to one Nowab Ali Chowdhry, upon whose decease in F. S. 1274 (1866-67), it descended to his wife the third defendant, who was a minor at the time; that in the same year, on the 2nd of Magh (22nd January 1867), the first defendant, Mahomed Arsad Chowdhry, wrongfully possessed himself of the animal, and that the third defendant on attaining her majority in F. S. 1280 (1873), sold it to the plaintiff, who, on the 25th of June 1874, instituted the present suit for recovery thereof.

The first defendant, who alone entered appearance, pleaded *inter alia*, that the action was barred by lapse of time.

The Subordinate Judge overruled this objection, and decreed the plaintiff's claim.

The defendant Mahomed Arsad Chowdhry appealed to the High Court.

Baboo Joy Gobind Shome, for the appellant, contended that the cause of action in this suit accrued on the 2nd of Magh 1274 or the 22nd of January 1867. The suit would be barred, if the plaintiff's vendor, the third defendant, was a major at the time

* Regular Appeal, No. 322 of 1874, against a decree of the Subordinate Judge of Zilla Sylhet, dated the 14th September 1874.

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 ARSAD
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 v.
 YAKOORALLY.

But though the lady would have been entitled to exclude the period of her disability from the period of limitation under s. 7 of Act IX of 1871, a purchaser from her is not entitled to the same privilege; the privilege is a personal one, and only passes on to the minor's representative in interest when the disability continues up to his death. The words of s. 7 expressly exclude a purchaser.

Baboo *Kally Mohun Dass*, for the respondent, contended that s. 11 of the old Act (Act XIV of 1859), which made no restriction as to the death of the minor to entitle his representative to the privilege should be looked at to show the intention of the Legislature as expressed in s. 7 of Act IX of 1871. It is extremely improbable that the Legislature ever intended that, whilst a minor plaintiff should be entitled to exclude the period of his disability from the time in which he might bring his action, a purchaser from him should be debarred from availing himself of his vendor's privilege, otherwise it would impose a serious burden on the freedom of contract.

Baboo *Joy Gobind Shome* was not called upon to reply.

The judgment of the Court was delivered by

MARKEBY, J. (who, after stating shortly the facts of the case, continued):—The date when the elephant was taken out of the possession of the then owner, was the 2nd Mangh 1274 (22 January 1867). And whatever be the exact nature of the cause of action which is put forward in this suit on the part of the plaintiff, it is admitted that the suit would be barred by the law of limitation, unless the plaintiff can bring himself within the provisions of s. 7, Act IX of 1871.

It is not contended that the plaintiff himself is a minor, but he seeks to take the benefit of that section as purchaser from a person who was a minor when this cause of action accrued. He is in fact the purchaser of the minor's claim to the elephant, and of her claim to damages on account of the elephant having been taken out of her possession. Now by s. 4 of the Limitation Act (Act IX of 1871), every suit must be brought within

the time specified in the schedule, unless there is something in the provisions in s. 5 to 26 of the Act itself, which absolves the plaintiff from that necessity.

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MABOMED
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v.
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It is not a question therefore, as is argued before us, whether by the words of s. 7 the purchaser from the minor is excluded, but whether he can bring himself within the provisions of that section. The general words of s. 4 are sufficient to exclude him unless he can do this. Now, the first part of the section says:—"If a person entitled to sue, be at the time the right to sue accrued, a minor, or insane, or an idiot, he may institute the suit within the same period after the disability has ceased, or (while he is at the time of the accrual affected by two disabilities) after both disabilities have ceased, as would otherwise have been allowed from the time prescribed therefore in the third column of the second schedule hereto annexed."

That is a right clearly personal and restricted to the minor himself. Then the third clause goes on to say:—"When his (the minor's) disability continues up to his death, his representative in interest may institute the suit within the same period after the death as would otherwise have been allowed from the time prescribed therefor in the third column of the same schedule."

The minor, therefore, or his representative in interest after his death, has a special period allotted to him for bringing the suit. There are no words whatsoever in s. 7, which would give to any other person, in whatever way he might happen to be connected with the minor, any other period for bringing the suit than that specified for ordinary persons. That this is the true construction of this section also appears to be clear, if we compare the words of s. 7 of the present Limitation Act with the words of s. 11 of Act XIV of 1859. There the words are "If at the time when the right to bring an action first accrues, the person to whom the right accrues is under a legal disability, the action may be brought by such person or his representative within the same time &c."

There is nothing there which in express terms limits the term "representative" to a representative at the death of the minor. Whether upon the true construction of s. 11 the word "representative" can be extended so as to include a purchaser from the

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minor suing in his lifetime, is a matter which of course we are not at present concerned to consider. No case has been shown to us, in which that section has been so extended. But however that may be, it seems clear that the intention of the Legislature was to make the language of the new Act more strict than the language of the old Act, and to limit the advantage of that section to the minor himself and to his representative after his death.

Some argument was addressed to us as to the improbability of the Legislature debarring the purchaser from a minor from any advantage which the minor himself might have. That is not a matter which can in any way enter into consideration of the construction of a section the language of which is not in any way ambiguous. But so far as this particular case is concerned, I think we may fairly say that we have no hesitation whatsoever in applying the law of limitation to the claim of the plaintiff. The claim is one which we should by no means encourage, even supposing we do not go so far as to hold that it is one which is contrary to the policy of the law, and therefore void. It is quite clear that it was a purchase of a very speculative kind and it is by no means improbable that, what is really meant to be tried under the allegation of this purchase, is some ulterior claim to more substantial part of the property of the minor. Therefore upon this ground of limitation alone, and without entering into any other portion of the case, we hold that the claim of the plaintiff is barred. But as there is a possibility of further litigation, we think it right to add that we express no opinion whatsoever whether the facts have been rightly found by the Court below. On the contrary, we feel bound to say that the investigation of facts in this case has not been in our opinion by any means satisfactory.

The judgment of the lower Court is reversed, and the suit dismissed with costs in this Court and in the Court below.

Appeal allowed.

ORIGINAL CIVIL

Before Mr. Justice Markby.

MODHOOSOODUN DEY v. BISSONAUTH DEY.

*Light and Air, Obstruction to Access of—Easement—Act IX of 1871, s. 27—
 Enjoyment “as of right”—Unity of Possession—Extinction of Easements—
 The English Prescription Act (2 & 3 Will. IV, c. 71), s. 3—Grant independent
 of User—Nuisance.*

1865
 Feb. 3.

In a suit to restrain the defendant from obstructing the access of light and air through certain windows of the plaintiff's house, it appeared that both the tenements had formerly constituted the joint property of a Hindu family, and that in 1835 a partition took place among the various members composing it, by which the tenement in the occupation of the plaintiff became separated from that occupied by the defendant; that the latter property was, in 1860, purchased by the plaintiff jointly with one G, but under the purchase the plaintiff took sole possession thereof; that in 1867, however, he relinquished it in favor of G in pursuance of an award, wherein it was found the plaintiff had no right or title thereto; and that in 1870 it was purchased by the defendant, who, in 1871 and 1872, erected the obstructions complained of by the plaintiff. *Held*, that though, in the interval between 1860 and 1867, the plaintiff had not such an estate in the servient tenement as to constitute unity of title in him to the two tenements, and thereby extinguish all easements between them, yet the unity of possession in the plaintiff during that period excluded the operation of s. 27 of Act IX of 1871, as the enjoyment during that time was not “of right.” *Semble*.—In order that the enjoyment should be “of right,” there must be an adverse exercise of it as against the servient holder.

Act IX of 1871 does not exclude other modes than therein provided of acquiring an easement by enjoyment.

In this case applying the law of prescription in force in Calcutta prior to 1871, which was the English law previous to the passing of 2 and 3 Will., c. 71, grant might be implied independently of user: and under the circumstances of the case, the plaintiff was entitled to such right of easements of light and air as can be inferred from enjoyment, i.e., a right to restrain the defendant from committing any act whereby the access of light or air should be so diminished as with respect to air to prove a nuisance or injurious to health, and with respect to light to render the house unfit for comfortable habitation.

Suit for an injunction to restrain the defendant from interference with, and obstruction of, the access and use of light and

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English Prescription Act, (2 and 3 Will. IV., c. 71) under which it has been held in England that easements can now be acquired only by prescription under the Statute—*Tapling v. Jones* (1); and by an analogous interpretation of Act IX of 1871, it is submitted that the plaintiff cannot acquire a title to an easement except under the Act. If, therefore, that Act applies, this suit is barred; for the obstruction by the defendant admittedly commenced in 1871, and the plaint was not filed until June 1874. But in this case there was unity of possession from 1860 to 1867, which had the effect of extinguishing all easements between the two tenements—Addison on Torts, 4th ed., pp. 139-140; *Onley v. Gardiner* (2) and *Battishill v. Reed* (3). Besides, the enjoyment under the Act must be “as of right,” and to be “of right” it must be exercised adversely to the holder of the servient tenement. In this case, however, there was a break in the continuity of the enjoyment “as of right” from 1860 to 1867, during which time the plaintiff was in possession of both tenements, for the plaintiff cannot be supposed, having been the owner of both the tenements, to have exercised the right adversely to himself. No injunction ought to be issued, the plaintiff having failed to prove any loss or damage—*Martin v. Gable* (4), *Jackson v. Duke of Newcastle* (5), *Durrell v. Pratt* (6), and *Robson v. Whittingham* (7).

Mr. *Bannerjee* in reply cited *Thomas v. Thomas* (8), *James v. Plant* (9), *Warburton v. Parke* (10), *Glaes v. Harding* (11), *Evart v. Cochrane* (12), and *Kelle v. Pearson* (13).

Cur. adv. vult.

MARKBY, J. (after stating the facts, continued);—The first question that has to be determined in this case is

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| (1) 11 H. L. Ca., 290. | (7) L. R., 1 Ch., 442. |
| (2) 4 M. & W., 496. | (8) 2 Cr. M. & R., 34. |
| (3) 15 O. B., 695. | (9) 4 A. & E., 749. |
| (4) 1 Camp., 320. | (10) 2 H. & N., 64. |
| (5) 10 Jur., N. S., 698; S. C. 3 DeG. | (11) 27 L.J., Ex., 286. |
| J. & S., 275. | (12) 7 Jur., N. S., 225. |
| (6) L. R., 1 Ch., 244. | (13) L. R., 6 Ch., 809. |

whether the plaintiff is entitled to any access of light and air at all by these apertures. The defendant has contended that the plaintiff can only claim an easement of light and air under the provisions of Act IX of 1871; and he argues that the Statute has no application to this case, first, because there having been unity of title to these premises in the plaintiff between the year 1860 and 1867, all easements between the two tenements were thus extinguished; and failing this, he argues that there having been unity of possession of the premises during that time, there was for that period no enjoyment of an easement as of right, and that in either case, therefore, the enjoyment of the easement as of right for twenty years ending within two years before the institution of the suit cannot be proved as the Statute requires.

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With regard to the first point I am of opinion that the plaintiff had not between 1860 and 1867 an estate of "as high and perdurable a nature" in the premises No. 13 as he had in the premises No. 12, and therefore, according to the rule laid down by Lord Coke, which, as far as I am aware, has not been departed from, the easements between the two tenements were not extinguished.

But I am of opinion that there having been unity of possession, the plaintiff did not during those years, as owner of the premises No. 12, enjoy as of right any easement in respect of the premises No. 13 of which he was the occupier. This question does not appear to me to depend upon the nature of the interest which the plaintiff had in No. 13, or upon whether his occupation was rightful or wrongful; it depends, in my opinion, upon what is meant by the Statute when it requires that there is to be enjoyment of the easement as of right, and whether the plaintiff has had such enjoyment. The quasi-possession or enjoyment of an easement, as of right, just like the possession of land or goods, depends according to the best authorities partly upon facts, but partly also upon intention. The possessor of land or goods must intend to hold them on his own behalf to the exclusion of any other person, or adversely, as it is called. The quasi-possessor of an easement must intend to enjoy it as claiming a right thereto against all persons, and especially as

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against the owner of the servient tenement. It seems to me impossible that a person can intend as dominant owner to enjoy an easement as of right against himself as servient occupier.

For these reasons it seems to me that the operation of the Statute is excluded, and that the plaintiff must establish his claim, if at all, upon the law as it stood prior to the Statute.

It has indeed been contended that the Statute excludes other modes of acquiring an easement by enjoyment. But this is clearly not so. There are no words in the Statute to which such a construction can be given, and with the history of the English Prescription Act before them, it can scarcely be supposed that the Legislature here, had they intended any such exclusion, would have omitted to express their intention. I must therefore dispose of this case upon the law as it stood prior to the passing of Act IX of 1871.

The law in Calcutta upon this subjects prior to the year 1871 was the law of English as it stood prior to 1832, subject to such modifications as the different circumstances of the two countries might require. By the law of England, as it then stood, the easement of light might be gained by enjoyment from time immemorial (that is to say, from the time of Richard II), by grant, express or implied, by grant inferred from modern user, and by necessity. It has been held that the circumstances in which the two countries differ prevent us from finding that an easement in Calcutta has been enjoyed from time immemorial in the peculiar English sense of the term. There is moreover no allegation here of an express grant, nor any claim for any easement by necessity. These are also, therefore, excluded. Nor has the plaintiff put his case upon the ground of an implied grant upon severance, but he has proved circumstances which bring this case very nearly within the decisions in which it has been held that a grant may be implied independently of user. The two tenements, No. 13 and No. 12, were down to the year 1835 held as the common property of a joint Hindu family, being used as their residence; and (as is commonly the case) with more than one building upon it. The plaintiff's house was then in existence with the apertures which are now in question. The property was divided into three shares. The document

which contains the terms of the partition recites that the three branches of the family "erecting houses and buildings did in succession reside there, and are now residing there."

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Now it seems to me extremely probable that upon such a partition the parties would understand each other mutually to grant some easements; and if we add to this, that through six out of seven of the apertures then existing, there has always been the same access of light and air as there was then until the defendant began to build, we may, I think, fairly infer that such easements or light and air as can be implied from enjoyment have been gained by the owners of No. 12 over No. 13. Though the right to the unobstructed access of light and of air is a negative easement, and though I am not disposed to depart from what I said in *Bagram v. Khetteranath Korformah* (1) and *Bhoobun Mohun Bannerjee v. Elliott* (2) about the acquisition of negative easements, unless compelled to do so by authority, I have no hesitation in finding that, under the circumstances of this case, the enjoyment leads to an inference of right.

So far then the plaintiff has established his case. But then it becomes necessary to see what are the particular rights which can in this case be inferred from the enjoyment. Here also I must apply the rules of the English law. No doubt this leads to some inconvenience. The reason for which apertures are made in the walls of houses in the two countries are very different. In England an aperture is made chiefly for light; the sun being less bright, and the air colder there, we desire to obtain all the light we can, and only to admit just so much air as is necessary for wholesome ventilation; for which reason we always use glass in our windows. In this country the object is precisely the reverse—to get as much air as possible, and to exclude the superfluous light. A comparatively small aperture will in this country light a room; but without a free current of air a room would very often be uncomfortable, and even unhealthy. Hence the frequent omission of glass, and the numerous contrivances of verandahs, jilmils, chicks, hoods, and so forth, which are all intended to shut out the light whilst the air is admitted.

But unfortunately the law of England being fashioned upon

(1) 3 B. L. B., O. C., 18.

(2) 6 B. L. B., 85.

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the wants of the inhabitants of that country has specially favored the acquisition of the right to free access of light, but has taken very little notice of the right to free access of air. "Light and air" have indeed very often been treated as one and the same easement: the right being looked upon as the right to have the aperture unobstructed, the owner using it for whatever purpose he pleased. This was the mode in which I dealt with the case when assessing the damages in *Bagram v. Khettranath Karformah* (1); but the Court of Appeal took a different view. As I understand Sir Barnes Peacock's judgment, he considers that the right to air stands now, as it did when *Alfred's case* (2) was decided, upon the ground of health, and that the Court interferes upon the ground of nuisance. This no doubt is in strict accordance with the English law. It is the same view as was taken by Lord Hatherly (then V. C. Wood) in *dent v. the Auction Mart Co.* (3), where he says:—"There are difficulties about the case of air as distinguished from that of light, but the Court has interfered to prevent the total obstruction of air." He then states that the obstruction in that particular case was one which the Court would recognize "on the ground of nuisance;" and adds "this is perhaps the proper ground on which to place the interference of the Court, although in decrees the words, light and air' are often used together as if the two things went *pari passu*." I think, therefore, I am bound by authority to hold that, in Calcutta, as under the English law, independently of Act IX of 1871. the only right which can be gained in respect of air is that there shall not be an obstruction which is a nuisance or injurious to health.

With regard to light there is no doubt considerable conflict in the recent English cases, but I think not quite as much as has been supposed. It seems to be considered that Lord Cranworth in *Clarke v. Clarke* (4) laid down principles entirely opposed to those which he laid down a few months after in *Yates v. Jack* (5); and that *Clarke v. Clarke* (4), and all the similar cases which preceded and followed it, are overruled by

(1) 3 B. L. R., O. C., 18

(2) 9 Rep., 58

(3) L. R., 2 Eq., 238, at p. 252

(4) L. R., 1 Ch., 16.

(5) L. R., 1 Ch., 295.

Yates v. Jack (1). But besides the apparent improbability that Lord Cranworth would have so suddenly changed his opinion, and would have passed over the change without any observation, I do not think the cases warrant that assumption. Of the cases on this subject, *Martin v. Goble* (2) was decided before the Statute of William IV. was passed. *Jackson v. Duke of Newcastle* (3), *Clarke v. Clarke* (4), *Durell v. Pritchard* (5) and *Robson v. Whittingham* (6) were all decided without reference to the words of the Statute 2 & 3 Wm. IV., c. 71. The decision in *Yates v. Jack* (1), on the contrary, was based entirely upon the words of that Statute. Whether it was an oversight, or whether the circumstances of the other cases excluded the operation of the Statute, I cannot say. In none of the other cases, however, is there any reference to the Statute whatsoever. All the cases, except *Yates v. Jack* (1), are, as far as appears in the reports, only a consideration of the right which could be gained independently of the Statute. The series of cases, therefore, which preceded *Yates v. Jack* (1) may, I think, be still looked upon as authority for what the right is independently of the Statute.

The only case referred to which does not admit of this explanation is *Kelk v. Pearson* (7). Both the Lords Justice there say very emphatically that the Statute has not altered the law. But it is obvious that the two learned Judges take a different view as to what was the law before the Statute. Sir William James says:—"The nature and extent of the right before that Statute was to have that amount of light through the windows of a house which was sufficient, according to the ordinary notions of mankind, for the comfortable use and enjoyment of that house as a dwelling-house, if it were a dwelling-house, or for the beneficial use and occupation of the house, if it were a warehouse, a shop, or other place of business. That was the extent of the easement—a right to prevent your neighbour from building upon his land so as to obstruct the access of

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(1) L. R., 1 Ch., 295.

(2) 1 Camp., 320.

(3) 10 Jur., N. S., 688; S. C. 3 DeG. J., & S., 275.

(4) L. R., 1 Ch., 16.

(5) *Id.*, 244.(6) *Id.*, 442.

(7) L. R., 6 Ch., 809.

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sufficient light and air to such an extent as to render the house substantially less comfortable and enjoyable."

Sir George Mellish says:—"Now what the right to light was previously to the statute, and is still at Common Law, I apprehend to be perfectly well established. No doubt it is principally in *nisi prius* cases that we find the rules laid down, but they all substantially agree. The first rule stated by Mr. Gale is that 'to maintain an action for obstructing light, it is sufficient to show that the easement cannot be enjoyed in so full and ample a manner as before, or that the premises are to a sensible degree less fit for the purposes of business or occupation;' and he cites the case of *Parker v. Smith* (1). That was, I presume, a case where the light was used for the purposes of business. When it is used for the purposes of residence I apprehend the rule to be the same. The question is, whether the house is rendered substantially less fit for the purposes of occupation than it was before. That is the right at law."

It is clear that the standard of comparison taken is not identical. One learned Judge refers to the "ordinary notions of mankind;" the other entirely to what it was before. This seems to me to point to a difference between the Courts of Common Law and the Courts of Chancery as to the law prior to the Statute. Sir W. James agrees substantially with the other Chancery Judges in his view as to what the law was before the Statute in the Courts of Chancery: and in case of conflict that is no doubt the law that we should accept here. Whether Sir William James is also right in saying that the law in the Courts of Chancery is still the same since the Statute as it was before, I need not consider.

This view of the matter relieves me from considerable difficulty, because the only decision of this Court which bears upon this matter, and which is the really binding authority upon me, is thus reconciled in respect both of light and air with the decisions of the English Courts of chancery. Sir Barnes Peacock lays down substantially the same rule as to interference with light as was laid down by Lord Cranworth in *Clarke v. Clarke* (2), and was adopted by the Lord Justice in *Robson v.*

(1) 5 C. & P., 438.

(2) L. R., 1 Ch., App., 16.

Whittingham (1).. *In Bagram v. Khattranath Karformah* (2)

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it is said : " It would be unreasonable to presume that the owner of the servient tenement intended to grant a right to the use of more light than was necessary for the comfortable and convenient habitation of the dwelling-house or that he intended to increase the value of his neighbour's house by reducing the value of his own land: Principles of general convenience, upon which the presumptions of right to light by prescription or grant depend, require that lights in a dwelling-house, which have been uninterruptedly used for a long time, should not be darkened so as to render the house unfit for comfortable habitation, but they do not require such a presumption as would impede the erection of buildings on the servient tenement, which would not deprive the dominant house of any degree of what was reasonably necessary for comfortable habitation."

The case of *Bagram v. Khattranath Karformah* (2) lays down the law independently of the Indian Statute in accordance with the English Chancery decisions independently of the English Statute ; and this I must accept as the law of Calcutta also, namely, that by enjoyment only the right to so much air can be gained as is necessary to avoid a nuisance, and only the right to so much light as is necessary for comfortable habitation.

Though therefore I should be quite ready in this case to infer from the enjoyment any right the inference of which the law will permit, yet I am bound by authority to see whether as to air the new buildings are so close to the plaintiff's house as to be a nuisance, and whether as to light the plaintiff's house has been rendered or is likely to be rendered unfit for comfortable habitation.

With regard to the building on the west, which is finished, I am bound to say that I do not consider that the evidence shows either that it is a nuisance, or that it has rendered the plaintiff's house unfit for comfortable habitation. I think I cannot find upon the evidence either that the plaintiff will not have reasonably sufficient air for health, or that he will not have sufficient light for comfortable habitation, and I must act upon the evidence before me. With regard to the building on the east,

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I think the plaintiff had ample ground for apprehending that the defendant intended completely to block up his windows on that side. The defendant has all along been very reticent about his intentions as to this building, and even now refuses to abandon the intention of building a second story on this side. I think I must find upon the evidence that this would so reduce the plaintiff's light as to render his house unfit for comfortable habitation, and that the plaintiff is therefore entitled to an injunction.

Attorney for the plaintiff : Mr. *Heckle*.

Attorney for the defendant : Mr. *Pittar*.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Markby

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Partnership—Liability of Partner for Purchases made by Co-partner out of the Scope of Partnership Business—Application of Proceeds of Sale to pay Partnership Debts.

C, the managing member in Calcutta of a firm of which B the other partner was absent in England, made, unknown to B and without authority from him, various purchases from the plaintiff of articles not within the scope of the partnership business. The purchases were made as for the firm, and were delivered on the partnership premises by the plaintiff. Subsequently the goods were taken to C's house, and, together with certain private property belonging to C, were sold by auction, and the whole proceeds of the sale were paid by C to a Bank in Calcutta, to the partnership account with that Bank and were eventually remitted to B in England as from the partnership funds, and applied in payment of certain bills of the firm then due. B, on coming to Calcutta, took over the management of the business from C. In a suit brought against B and C for the price of the goods purchased from the plaintiff, held both in the Court below and on appeal that B was not liable.

APPEAL from a decision of Phear, J., dated the 21st June 1875.

The material facts are sufficiently stated in the judgment appealed from, which was as follows:—

PPEAR, J.—The plaintiffs sue F. W. Baker and E. Catliff,

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carrying on trade and business as milliners and silk mercers under the style of Baker and Catliff, to recover Rs. 4,068, the value of goods sold and delivered to the partnership between the 19th and 25th days of January last. The defendant Catliff makes no defence. The defendant Baker admits that at the time of the alleged sale he was in partnership with Catliff carrying on the business of dealers by retail in drapery, hardware, and fancy goods ; but he says he knew nothing of the alleged purchase ; that he was absent in England at the time it was said to have taken place and continuously for a considerable period previously thereto ; and that, with the exception of certain of the goods which he names, the purchase of the goods which are the subject of suit was not within the scope of the partnership : that he did not in any way authorize the purchase of them, and that neither he nor the partnership is liable to pay for them. For the excepted goods he pays the money into Court, the price which is now claimed for them (Rs. 396). The material facts of the case are very simple. The bulk of the goods, for which the defendant Baker objects to pay, are Manila cheroots, preserved ginger, tea-pots in baskets and China tea. These were bought of the plaintiffs by the defendant Catliff as for the partnership, and were delivered to him as to the partnership on the partnership premises in the month of January of this year. These facts are practically beyond question on the evidence. The goods were not however afterwards disposed of on the partnership premises, but were, on the 3rd of February, taken to Catliff's private house, and there, on the next day, were sold by auction together with a quantity of furniture belonging to Catliff personally. Baker was, no doubt, at this time in England and did not come out to Calcutta until the 21st of February, nearly three weeks after this event, and it is quite plain that he had not personally anything whatever to do either with the original purchase of the goods from the plaintiffs, or with the sale of them again on the 4th February, as I have mentioned. He was, by the terms of the partnership deed, an absentee partner, and Catliff was the managing partner in Calcutta. It is also proved, and I think it is manifest, that these goods did not fall within the

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scope of the ordinary business of the partnership, as alleged by the plaintiffs in the plaint, nor even within the business of the partnership (somewhat more extended, though that is) which is admitted by the defendant Baker in his written statement; and it seems to me that no such enlargement of the partnership was made out by the evidence as would serve to embrace them. By Mr. Martin's own account the dealing in these things was altogether a novel proceeding on the part of Catliff. He was going to try something that the partnership never had done before, and so it seems to me beyond all possibility of serious question that the purchase which Catliff made from the plaintiffs was not binding upon the defendant Baker by reason of any partnership relation between him and Catliff existing at the time.

Some attempt was made to argue that Baker must be taken to have connived at or to have acquiesced in Catliff's having added various heterogeneous branches to the partnership business, it was urged that the fact of his doing so was well-known in Calcutta, that advertisements appeared in various leading papers, and I was asked to conclude that Baker must have known of it, and consequently, not having stepped in to interfere, he must be taken to have adopted it. But in the first place I think that no sound ground is established for this argument. All the advertisements were undoubtedly Catliff's own acts, and there is nothing to show that they had in fact come to the personal knowledge of the defendant Baker at any time, certainly not at a time which would have enabled him to step in and interfere before he did actually do so. And, even if ground of this kind had been made out, still, so far as I understand the facts, none of the branches which Catliff had started at the time of this purchase could reasonably be said to have covered the articles of this purchase. It is not to be said, because he added a tailoring business which had been acquiesced in by Baker, that Baker had agreed to his dealing in ginger and China preserves, and we do certainly find that almost as soon as Baker could have heard of the extraordinary dealings of Catliff he came out to this country to stop them.

Lastly it was suggested, though I think not very strongly

pressed, that if one of two innocent persons must suffer, that is either Baker or Martin, it should be Baker, because he had allowed Catliff to behave in a position in which he could do wrong and also, it was added, had, by settling the partnership matters with him, enabled him to get out of the way, beyond the reach of the plaintiffs. In a late case I had to examine very much in detail the principles on which equity does adjust liabilities of this kind, and I think I need not dwell upon them now. It seems to me that if Baker is not liable to the plaintiffs for any other reason, he certainly cannot be made liable merely on account of the favorable position in which Catliff stood for being dishonest if he chose to be so. If then we take our stand on the facts so far as I have just now stated them, the result seems to be that Baker is not liable on the contract of purchase of these goods; Catliff was not his agent in making it, and he, that is Baker, had done nothing to ratify it. The goods did not in fact come to him, were not used by him personally, or by the partners jointly, in the ordinary course of the partnership business. But it was further proved by the evidence that the defendant Catliff paid the proceeds of the auction sale which had taken place at his house, that is, the proceeds of the goods and of his own furniture, into the Oriental Bank Corporation, into the partnership account with that Bank, and that the total amount was remitted to Baker in London, as if from the partnership funds in order to meet bills of the partnership which were falling due in England, and for the usual business of the partnership; and it was urged that, inasmuch as the partnership had had the benefit of the money arising from the sale of the goods it was bound to pay for the goods. Some little obscurity was introduced into this part of the case by the use of the word "partnership" or "firm" as if it were a distinct entity like "corporation" or "company." No doubt among commercial men there is prevalent a view of this kind, and it has always been a project with law reformers at home to constitute a firm a trading corporation; but it is not so at law, and in the eye of the law the partnership has no distinct existence apart from the members of the partnership. The liability of the members of the partnership is, for each, a distinct individual liability

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coupled with the fact that each one is agent of the other in partnership matters. The proposition then comes to this, that Baker was bound to pay for the goods which Catliff purchased of the plaintiffs, though he was not bound by the contract of purchase itself, and this because he either wholly in person, or jointly with Catliff in partnership, got the benefit of the money produced by the sale of goods. But in like manner, so far as the evidence goes, as was very pointedly observed by Mr. Branson, Mr. Baker got the benefit of the money which arose from the sale of Mr. Catliff's piano, drawing-room chairs, and so on. I suppose however that no one would be so bold as to maintain that, in the event of the piano and the chairs not being paid for, Mr. Baker is bound to pay for them. No doubt it may be said that the two cases are not strictly parallel, because the goods in question were originally bought in the name of the partnership, while it may be assumed that Catliff's furniture was bought in Catliff's own name alone. But this, I think, can scarcely be a material difference, at least at the stage of the case at which we have arrived; because we have reached the conclusion that Catliff had no authority to buy the goods in the partnership name, and his unauthorized act in so doing cannot, I apprehend, for any purpose, bear against Mr. Baker until it has been accepted or ratified. This, as I have already mentioned, has never been done, and it was not done by the act of Mr. Baker receiving the money in London, whether he received it for his own personal advantage or on behalf of the firm, because at that time he was quite ignorant of the source from which the money came.

And if the authorities upon which the proposition is apparently founded be closely looked into, they do not in reality countenance it. A judgment in *Re the Port Canning, &c., Company* (1), which was delivered by myself, was referred to, and I may say that the whole tenor of that judgment is adverse to that proposition. The argument there was that "in equity the Port Canning Company having, with a legal capacity to receive money, taken money without giving consideration, it would be contrary to all principles of equity and justice

(1) 7 B.L., 588, at p. 600.

that the Company should be allowed to retain it." This point is thus dealt with in the judgment. "The principal cases in the English Courts which have suggested this argument are *Re Phoenix Life Assurance Company* (1), *In re German Mining Company* (2), and *In re Cork and Youghal Railway Company* (3), and they seem to me to represent two distinct classes: one class consists of cases in which the money has been advanced for a purpose which totally fails, and in which the allegation to repay arises solely by implication of law out of that failure of consideration. Such an implication will arise against a corporation, which, with power to receive money, has received money as against an individual. The other class embraces the cases in which money borrowed without authority has been applied to discharge legal liabilities of the Company; and in these the lender is allowed in a Court of Equity to take the place of creditors whose debts have been paid with his money. Of this latter class, I may remark, Lord Justice Giffard lately spoke thus:—I have no hesitation in saying that those cases have gone quite far enough, and I am not disposed to extend them." This Judgment ended by holding that the receipt of money by a corporation under the facts of that case did not make it liable to repay. The case in which Lord Justice Giffard made this remark is the case of the *National Permanent Benefit Building Society, Ex parte Williamson* (4). At page 313 he says: "a class of cases has been referred to on that subject; the principal of which are *In re German Mining Company* (2), and *In re Cork and Youghal Railway Company* (3), the latter of which was before the Lord Chancellor and myself a short time ago; I have no hesitation in saying that those cases have gone quite far enough, and that I am not disposed to extend them. They were decided upon a principle recognized in old cases, beginning with *Marlow v. Pitfield* (5), where there was a loan to an infant, and the money was spent in paying for necessaries, and in another case of a more modern date, where there was money actually lent to a lunatic and it went in paying expenses which were necessary

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(1) 2 J. & H., 441.

(3) L. R., 4 Ch., 748.

(2) 4 DeG. M. & G., 19.

(4) L. R., 5 Ch., 309.

(5) 1 P. Wm., 558.

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for the lunatic. In such cases it has been held, that although the party lending the money could maintain no action, yet inasmuch as his money had gone to pay debts which would be recoverable at law, he could come into a Court of Equity and stand in the place of those creditors whose debts had been so paid. That is the principal of those cases. It is a very clear and definite principle, and a principle which ought not to be departed from."

If that principle were applied to the present case, it would cut down the proposition to something of this form, that as the money realized by the sale of the plaintiff's goods went to pay off certain debts of the partnership, Mr. Baker, as a member of the partnership, is bound in equity to allow the plaintiff to stand in the shoes of the persons whose debts were paid off.

Well, let it be so; in whose shoes will Mr. Martin stand? According to the evidence before the Court of some unknown creditors in London, and then only to the extent to which the money has gone in paying their debts. At the very outside it would be the money realized at the auction-sale. But that is not what the plaintiff is suing for. He sues for the price of goods sold, a very different thing from the price realized by them at the auction-sale. In truth, the plaintiff has not put his case on that ground at all, and he has given no facts upon which the Court could convert his suit into one of that kind. The leading case of *Marlow v. Pitfield* (1) was distinctly placed upon the footing which the Lord Justice mentions. The Master of the Rolls there held that the lender of the money should stand in the position of the person paid, that is the creditor, and should recover in equity as the other should have done at law.

When I say that, in order to get the benefit of the cases, the proposition must be cut down in the way I have suggested, I, desire to guard myself from being supposed to express the opinion that the principle of this class of cases, in which an advance of money was the subject of the suit, could be applied to a case like the present, where the subject of suit is goods sold and delivered. I only mean to say that if that principle be

applied, it seems to me that it fails to give the plaintiffs a cause of action in the present case. There is no creditor brought before the Court by the evidence who would himself be able to recover against Mr. Baker if his debt had not been paid and in whose shoes the present plaintiff would be entitled in equity to be allowed to stand.

On the whole then I am of opinion that the plaintiff's suit fails for those articles which Mr. Baker objects to pay for. I think I must yield to Mr. Jackson's claim for the two Japanese vases Rs. 25. A decree may therefore be given for the plaintiffs for this amount which, under the circumstances of the case, is a nominal decree. I think the plaintiffs are entitled to costs of suit up to the time that the money was paid in to Court; and, regard being had to all the circumstances of the case, I must order each party to pay his own costs from that time. The cost will be taxed on scale No. 2. There will be a decree for the full amount with costs on scale No. 2 against the defendant Catliff.

From this decision the plaintiffs appealed.

Mr. W. Jackson, for the appellants, contended that the defendant Baker was liable in the present suit on the principle of the cases in which it had been decided that an action will lie for money lent to an infant to purchase necessities, if the money has actually been expended in purchasing such necessities; see *Ellis v. Ellis* (1). That principle was that a person who has received the benefit of the money lent or necessities supplied cannot repudiate liability. In the present case it is submitted that as the firm had the benefit of the money realized by the sale of these goods, inasmuch, as it went to pay a debt of the firm to the Oriental Bank, they are liable to that extent to the plaintiffs who are entitled to stand in the place of the Bank. So, though by common law a person cannot receive from the husband money advanced by him to the wife to enable her to purchase necessities, yet in a Court of Equity such a person is entitled to stand in the place of the person who actually supplied such necessities, and to

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(1) 1 Ld Raym., 344.

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recover from the husband such sums advanced to the wife as have been applied to the purchase of necessaries—*Jenner v. Morris* (1); see also *Lindley on Partnership*, vol. i, 3rd ed., pp. 286 and 377, and the cases there cited of refund ordered of money received by companies without consideration. [MARKEBY, J. The refund in all these cases was made out of the funds of the company, not those of any individual]. The defendant Baker has taken over all the assets of the partnership. The principle of the cases appears from the context to apply to partnership as well as companies: the section is headed ‘Liability of partnerships, and companies in respect of contracts not binding on them, but of which they have had the benefit and the conclusion is that in equity they are liable, though not in law; see *Pare v. Olegg* (2), though certainly it seems to be admitted that the cases of *In re Phoenix Life Assurance Company* (3), *In re Cork and Youghal Railway Company* (4), and *Re Magdalena Steam Navigation Company* (5), have gone to some length; see *In re National Permanent Benefit Building Society* (6). [MARKEBY, J. There the principle is not applied to partnerships.] See *Jenner v. Morris* on appeal (7), *Harris v Lee* (8), *Marlow v. Pitfield* (9), and *In re National Permanent Benefit Building Society* (6). The form in which the plaintiffs have stated their cause of action does not prevent their obtaining relief in equity.

Counsel for the respondents were not called upon.

GARTH, C. J.—(After shortly stating the facts, continued):—The plaintiffs now appeal from this judgment; and they put their case upon this novel ground. That although Catliff had no authority, direct or indirect, to purchase the goods in question for the firm, the firm had the benefit of them in this way. After Catliff had bought them from the plaintiffs, he sold them with other things of his own by auction; and the proceeds

(1) 1 Drew. & Sm., 218

(2) 29 Beav., 589.

(3) 2 J. & H., 441.

(4) L. R., 4 Ch., 748.

(5) John., 690.

(6) L. R., 5 Ch., 309.

(7) 3 DeG. F. & J., 45.

(8) 1 P. Wms., 482.

(9) *Id.*, 558.

were paid into the firm's account at the Oriental Bank, who were their bankers and to whom they were at that time largely indebted. It was therefore argued by Mr. Jackson, that as the firm had the benefit of these goods to the extent of the sum which they realized at the auction, and as that sum went to pay the Oriental Bank a portion of the firm's debt, the plaintiffs had a right to that extent to stand in the place of the Oriental Bank, and to recover from both defendants the amount which the Bank received.

In support of this argument, our attention has been called to several authorities, some of which were commented upon by Phear, J., in the Court below; but upon considering those authorities, we find nothing to justify us in applying or extending the principles upon which they proceeded, to the present case.

It is perfectly true, that where money has been advanced, either by loan or otherwise, to individuals or companies, under circumstances which preclude the persons advancing the money from recovering it at law from the recipients, and that money has been applied in paying the debts of *bonâ fide* creditors of the individuals or companies to whom it was advanced, Courts of Equity have in some cases allowed the persons so advancing the money to stand in the place of the creditors, and to recover their money from the recipients, as equitable assignees of the debts so paid off. But the tendency of modern decisions undoubtedly has been to confine, rather than to extend, the principle of these cases—1 Lindley on Partnership, p. 378, and the observation of Lord Justice Giffard in the *National permanent Benefit Building Society* (1)—and it appears to us, that to allow the plaintiffs in this suit to succeed in their contention, would be to extend that principle far beyond any safe limits.

In this case the plaintiffs have not advanced any money at all. They have sold goods somewhat incautiously to Mr. Catliff during the time that his partner was in England, without taking any steps to ascertain whether the nature of the business carried on by the firm warranted them in supposing that Mr. Catliff had any right to pledge his partner's credit, and now having

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found that Mr. Catliff had no such right, and having ascertained that the goods had been resold by Catliff, and the proceeds paid to the firm's account at the Oriental Bank, they seek to place themselves in the position of the bankers, and, as their assignees, to recover from Mr. Baker the amount realized by the resale of the goods. This would indeed be stretching the principle of the cases to which we have referred to a very alarming extent, and one to which we certainly cannot give our sanction.

Apart, however, from this consideration, the form in which the plaintiffs' claim is stated upon this record, appears to us to raise a very serious obstacle in the way of his present contention. He has sued the two defendants as co-contractors in the usual way for the price of goods sold. He has recovered against one defendant the whole of his demand, and against the other defendant a part of his demand, upon that basis; and now he proposes to change the nature of his claim entirely as against one of the defendants, and to make him liable, not for the price of the goods sold, but for the amount of the proceeds of the goods which proceeds he claims in a totally different character from that in which he brought his suit, in which latter character he has recovered the whole of his claim against one defendant, and a portion of it against the other.

The appeal must therefore be dismissed with costs on scale No. 2.

Appeal dismissed.

Attorneys for the appellants: Messrs. *Verlannes* and *Doss*.

Attorney for the respondents: Mr. *Hechle*.

PRIVY COUNCIL.

SADASIVA PILLAI (PLAINTIFF) v. RAMALINGA PILLAI
(DEFENDANT).

[On appeal from the High Court of Judicature at Madras.]

P. C.^o
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Act XXIII of 1861, s. 11—Execution—Mesne Profits and Interest—Estoppel.

In construing the provisions of s. 11, Act XXIII of 1861, notwithstanding certain earlier decisions to a contrary effect, all the Indian High Courts have now recognized it to be settled law that, where the decree is silent touching interest, or mesne profits, subsequent to the institution of the suit, the Court executing the decree cannot, under the section in question, assess or give execution for such interest, or mesne profits, but that the plaintiff is at liberty to assert his rights thereto by a separate suit.

The Judicial Committee of the Privy Council, although of opinion that, if the matter had been *res integra*, the provisions of the section might have admitted of different interpretation being unwilling to run counter to a long and concurrent course of decisions of the Indian Courts in what is really a mere matter of procedure accepted this construction of the law as binding.

The plaintiff obtained a decree for the possession of certain lands, with mesne profits up to the date of suit. No claim was made in the plaint for mesne profits accruing due after the date of suit, and the decree was silent in respect thereof. An appeal against the decree having been brought by the defendant, execution was from time to time stayed by the Court on the defendant giving security, to abide the event of the appeal, for the execution of the decree, and for payment of the mesne profits accruing while the plaintiff remained out of possession. The decree having been confirmed on appeal, the plaintiff applied for execution in respect of the interim mesne profits.

Held in the Court below that, as there were not provided for by the decree, they could not, under s. 11, Act XXIII of 1861, be awarded in execution, but must be made the subject of a separate suit.

Held by the Judicial Committee that the proceedings whereby the defendant led the Court to stay execution and continue him in possession laid him under an obligation to account in the suit for the mesne profits, which he engaged to pay; and that this obligation was capable of being enforced by proceedings in execution, notwithstanding the construction given by the Court to section 11; since even if the defendant's liability to

* *Present:* SIR J. W. COLVILLE, SIR B. PHACOCK, SIR M. E. SMITH, and
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account were not to be considered "a question relating to the execution of the decree," within the meaning of the section, he was, in any case, precluded by the ordinary principles of estoppel from contending that the mesne profits in question were not payable under the decree.

Where a Court has a general jurisdiction over the subject-matter of a claim, parties may be held to an agreement that the questions between them should be heard and determined by proceedings contrary to the ordinary *cursus curiæ*.

The case of *Hisani v. The Attorney-General of Gibraltar* (1) approved.

Appeal against an order of the High Court of Judicature at Madras (MORGAN, C.J., and INNES, J.), dated 28th June 1872 (2), reversing an order of the Civil Court of Cuddalore, under which the plaintiff, now appellant, had, in execution of a decree of the said Civil Court, as altered and amended by the late Sudder Court of Madras, been awarded certain mesne profits not specifically provided for in such decree.

The facts of the case were the following:—

In the year 1858, the appellant brought a suit in the Civil Court of Cuddalore against one Chiddunbrun Pillai to enforce his right to a share in certain family property. Among the items of his claim as set forth in his plaint, was a demand for the mesne profits of certain land for the Fusli year 1267, being the year preceeding the date of his suit. He made no claim for mesne profits accruing after the date of suit. On the 12th June 1859, the Cuddalore Court gave a decree recognizing the plaintiff's right to the possession of the lands in question, and awarding him mesne profits for the Fusli year 1267, as claimed in his plaint. Nothing, however, was said in the decree as to mesne profits accruing subsequent to the date of suit. Against this decree both parties appealed to the Sudder Court,—the defendant on the whole case, the plaintiff as not having been allowed a share in certain portions of the joint estate to which he contended that he was entitled.

While these cross-appeals were pending, the plaintiff, in a petition to the Cuddalore Court, dated the 8th December 1859, applied that the defendant might be required to furnish security

(1) L. R., 5 P. C., 518.

(2) 7 Mad. H. C. R., 97.

for the amount of the decree which had been passed against him, with costs and interest thereon ; and, further, for the mesne profits of the Fusli years 1268 and 1269, inasmuch as he, the plaintiff, was still being kept out of possession. In a counter-petition, dated 20th December 1859, put in by the defendant, he admitted his liability to give security, but only for the amount actually decreed, and not for mesne profits the amount of which had not been ascertained. The Civil Court, overruling these objections, passed an order in accordance with the plaintiff's petition, requiring the defendant to give security for payment of the mesne profits for the Fusli years 1268 and 1269 in addition to those of the Fusli year 1267. The defendant executed a bond to this effect on the 26th January 1860, and no steps were afterwards taken by him to set aside either the bond itself or the order of the Court under which it was given.

The defendant's appeal to the Sudder Court against the decree of the Cuddalore Court was dismissed on the 29th August 1860, and on the 24th September following, the plaintiff's cross-appeal was decided in his favor, the Sudder Court modifying the original decree, and awarding the plaintiff a sum in excess of what had been allowed in the lower Court. In all other respects the decree of the lower Court was confirmed.

Subsequent to this decision of the Sudder Court, the plaintiff, in contemplation of the defendant's deciding to carry the case on appeal before Her Majesty in Council, again applied to the Cuddalore Court, by a petition dated the 11th December 1860, praying that execution might issue against the defendant, or that he might be called upon to give security for so much of the modified decree as was not covered by the previous bond, and also for the mesne profits of the Fusli year 1270 with interest thereon. In a counter-petition, dated the 10th January 1861, the defendant objected to the plaintiff's valuation of the mesne profits of the year 1270, which had not then been ascertained, and to the claim for interest on mesne profits ; but declared his readiness " to furnish security for the amount awarded to the plaintiff by the appeal-decree, and for the produce which may thereafter be reaped, . . . what the actual yield of the produce is being a question which

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must be reserved for decision upon an investigation in the event of a final execution being thereafter had."

On these petitions an order was passed by the Cuddalore Court, directing the defendant to execute a further security, covering the mesne profits of the Fusli year 1270. This was done on the 19th March 1861, and execution of the decree was stayed.

In the year 1862, while his appeal to the Privy Council was pending, the defendant died, but the proceedings were revived by his son and heir, Ramalinga, the present respondent.

On the 29th January 1863, the plaintiff petitioned the Cuddalore Court that security might be taken from the said Ramalinga for the mesne profits of the Fusli years 1271 and 1272, and that, on his failing to give such security, he, the plaintiff, might be permitted to take out execution. A counter-petition was filed by Ramalinga, in which, without resisting the application for security, he merely objected to the mode in which the plaintiff had calculated the mesne profits for the said years, and claimed to be credited with a surplus amount of security given under his father's bond of the 19th March 1861. An order of the Court was thereupon made, in compliance with which the respondent executed the security bond of the 25th April 1863, which will be found set forth in their Lordships' judgment (1).

On the 4th February 1864, the appeal to Her Majesty in Council was rejected (2), and the decree of the Indian Courts confirmed.

In August of the same year, the plaintiff applied to the Cuddalore Court for execution of his decree by delivery to him of the lands, &c., in dispute, including in his claim the mesne profits for the Fusli years 1261 to 1278. He also claimed a further sum by way of interest on these mesne profits. In a counter-petition, dated the 14th October 1864, the respondent did not dispute his liability to account for mesne profits, but suggested that the matter might more properly be settled either by a compromise or by a regular suit. He repudiated, however, the claim for interest on mesne profits as neither awarded by the decree nor provided for by the security bonds.

(1) *Post*, p. 400.

(2) See 9 Moore's I. A., 506.

After considering these petitions, the Cuddalore Court, on the 4th January 1865, "ordered that process of execution do issue for what ~~is~~ provided for in the decree;" and on the 6th of the same month, a warrant was, accordingly, issued for execution in respect of the money payable under the decree, in which warrant the mesne profits for the Fusli year 1267 only were specified. The amount of this warrant was duly paid by the respondent. The delivery over to the plaintiff of the landed property included in the decree was not finally completed until the beginning of 1866. In the meanwhile no appeal was preferred by the plaintiff against the order passed by the Cuddalore Court on the 4th January 1865, nor any objection taken to the terms of the warrant which limited execution in respect of mesne profits to the mesne profits of Fusli 1267. No steps were taken by the plaintiff to have execution for further mesne profits, until the 16th July 1867, when in a petition to the Cuddalore Court he again asked for execution in respect of the mesne profits of the Fusli year 1268 to 1273, with interest, treating these as portions of the decree for which the execution sought in his petition of the 20th September 1864 had not yet been given him. Further petitions to the same effect were subsequently presented by the plaintiff. On the 25th April 1868, a counter-petition was filed by the defendant, in which he says:—"The plaintiff now claims mesne profits for the year subsequent to the decree. Though this petitioner is bound to pay the same, still the amount asked by the plaintiff is excessive, and has been fixed by him at his pleasure. This is not proper. The Court should show a good deal of mercy and pay a good deal of attention in this matter; for it cannot be the intention of the Court of Justice to subject a man who had once suffered a very heavy loss in a certain matter to the further loss of a large sum." In the same petition he also says:—"Every security bond executed by the defendant clearly provides that he would submit to any amount which may hereafter be determined by the Court."

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On the 15th April 1871, the Judge of the Cuddalore Court appointed a commissioner to report on the amount of the mesne profits of the Fusli years 1268-1274, and on the

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20th July 1871 the commissioner reported that a sum of Rs. 23,455 was due to the plaintiff in respect of such mesne profits. The defendant, in petitioning against the finding of the commissioner, confined his objection to the amount of that finding, which he alleged was excessive. The plaintiff, on the other hand, presented a petition, complaining of the commissioner's finding as being too small.

On the 31st January 1872, the Civil Judge passed his final order, modifying the amount found to be due by the commissioner, and awarding the plaintiff the sum of Rs. 36,223 as mesne profits for the seven years from Fusli 1268 to Fusli 1274, together with costs in execution and the costs awarded by the Privy Council. The Judge disallowed the claim for interest.

Against this order the defendant at once appealed to the High Court at Madras, for the following, among other reasons : that the mesne profits in question were neither asked for in the plaint nor awarded to the plaintiff in the decree, and the Judge therefore had no jurisdiction to award them under s. 11 of Act XXIII of 1861 ; that no stamp duty had been paid by the plaintiff on the amount claimed by him as mesne profits ; and that his claim for mesne profits for more than six years was barred by the law of limitation.

On the 15th June 1872, the plaintiff also put in a memorandum of objections to the order of the Civil Judge, the chief of which objections was that the Judge had not awarded interest on the amount allowed as he ought to have done.

On the 28th June 1872, the High Court reversed the order of the Civil Judge, and declared that under the decree mesne profits subsequent to the year 1858 were not recoverable.

From this decision the plaintiff appealed to Her Majesty in Council.

Mr. *Leith*, Q.C., and Mr. *S. G. Grady* for the appellant.— This appeal arises out of a previous litigation, in which the Privy Council passed an order affirming the decree of the Indian Courts (1), under which the appellant was declared entitled to the possession of certain lands with mesne profits

(1) See 9 Moore's I, A, 506—511.

up to the date of suit. The question now is whether in execution of that decree the appellant can realise mesne profits accruing subsequent to the date of the suit with interest thereon, no order in respect of such mesne profits or interest having been made in the decree itself; or whether he must bring a separate suit for their recovery. The dispute is as to the mesne profits of the Fusli years 1268 to 1274, a period of seven years. If the plaintiff's remedy is by suit and not by way of execution, that remedy has probably been lost by limitation. The objection that the plaintiff could not recover in execution was not taken in the earlier stages of the proceedings in the lower Courts. The defendant did not then deny his liability for the mesne profits accruing after the date of suit he only disputed their amount, and he agreed that their amount should be determined by the Court. The amount having been fixed by the Court after taking evidence, the defendant is bound by that finding.

The Madras Court has held that the mesne profits and interest claimed are not recoverable in execution. This decision is wrong on two grounds: first, because it proceeds on a wrong interpretation of the enactments on the subject; second, because the parties were bound by their own proceedings to submit to the award of the Court executing the decree.

As to the first point. An order decreeing possession carries by its own force the right to mesne profits, although the order gives no direction as to these; see the Judgment of Lord Cairns in the case of *Raja Lilanund Sing v. Maharaja Lichimpur Sing Bahadur* (1); and the right to interest follows on the same principle. Before the Procedure Code was passed, Courts executing decrees had wide powers vested in them for awarding mesne profits accruing *pendente lite*. These powers are recognized and continued in s. 11, Act XXIII of 1861. In construing this section, the earlier decision of all the Indian Courts recognized the powers of Courts executing decrees to award mesne profits; see the case of *Chennapa Nayudu v. Pichi Reddi* (2), *Narayana Aiyar v. Srinevasa*

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(1) 5 B. L. R., 605; S. C., 13 Moore's I A., 490.

(2) 1 Mad. H. C. R., 453.

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Aiyar (1), *Lakshmi Narasimhalu v. Srinivasa Rau* (2), and *Virasawmy Mudali v. Manommay Ammal* (3), decided by the Madras High Court; *Jiva Patil Rahimwa v. Maluji Maru Nathuna* (4), decided by the Bombay Court; *Mussamat Hookum Bibee v. Khajah Mahomed Moosa Ahan* (5) and *Beer Chunder Joobraj v. Ram Coomar Dhur* (6) decided by the Calcutta High Court and *Oonker Dass v. Heera Singh* (7), decided by the High Court of the N. W. Provinces. The course of the decision has, however, been altered since the judgment given by a Full Bench of Calcutta High Court in the case of *Moosoodun Lall v. Bheekari Sing* (8). This judgment proceeds on the view that s. 11, Act XXIII of 1861, refers only to cases in which the payment of mesne profits or interest has been provided for in the decree under ss. 196 and 197 of Act VIII of 1859. This is an undue restriction of the meaning of the words in s. 11 "payable in respect of the subject-matter of a suit." These words ought not to be interpreted merely to mean "payable under a decree." The section provides not only for the case of interest and mesne profits awarded under a decree, but for cases in which the decree has been silent as to these. The cases of *Subba Venkataramaiyan v. Subraya Aiyar* (9), *Radhabai v. Radhabai* (10), and *Hur Churn Lal v. Toorab Khan* (11), decided respectively by the High Courts of Madras, Bombay, and the N. W. Provinces, merely follow the Calcutta ruling.

As to the second point. Whatever construction is to be put on the section in the question, the respondent is bound to carry out the engagement which his father and himself entered into as the condition of their being continued in possession. The security bonds which they gave from time to time were not merely written agreements between parties, but were obligations which the respondent and his father came under to the Court to abide by its

(1) 2 Mad. H. C. R., 435.

(2) 3 Mad. H. C. R., 287.

(3) 4 Mad. H. C. R., 32, at p. 41.

(4) 3 Bom. H. C. R., A. C., 31.

(5) 6 W. R., Mis., 14.

(6) 6 W. R., Mis., 26.

(7) 1 Agra H. C. R., 141.

(8) B. L. R., Sup. Vol., 602.

(9) 4 Mad. H. C. R., 257.

(10) 4 Bom. H. C. R., A. C., 181.

(11) 2 All. H. C. R., 176.

determination. If the respondent was dissatisfied with the terms which the Court offered him, he could have appealed against the order of the Court. Having accepted them, and having had the benefit of them, he cannot now be allowed to repudiate his part of the contract. The effect of the security bonds is to put the case on the same footing as if mesne profits had been awarded under ss. 196 and 197 of Act VIII.

Interest on mesne profits is not provided for in the bonds, but the right to interest is consequential on the right to mesne profits being established, in the same way as an order of the Privy Council for repayment of the sum paid in satisfaction of a judgment implies repayment with interest—*Rodger v. The Comptoir d'Escompte de Paris* (1).

Mr. J. B. Norton and Mr. J. D. Mayne for the respondent.—It was open to the plaintiff to have asked in his plaint for mesne profits from the date of suit to the date of his being restored to possession. Though he did not do so, it was still competent to the Civil Court in making its decree to award mesne profits from the date of suit, and to direct their ascertainment by the Court executing the decree. On the Court's omitting to do this, the plaintiff might have proceeded by appeal or review to have the decree amended. None of these courses having been followed, the plaintiff must be taken to have accepted the decree as made, and to have been content with such relief as it provided. The question, therefore, is, can he, under the decree which he obtained, have execution in respect of mesne profits, as to which the decree is silent? Whatever views may formerly have been entertained by the Indian Courts, their construction of s. 11, Act XXIII of 1861, and ss. 196 and 197 of Act VIII. of 1859, is now uniform, to the effect that these sections must be read together, and that they do not admit of mesne profits being given in execution where they are not provided for in the decree. The decision of the Full Bench of the Calcutta High Court in the case of *Mosoodun Lall v. Bheekaree Singh* (2), which has been followed in all the other Presidencies, was no innovation in procedure; it refers to previous cases in which

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(1) 7 Moore's P. C. (N.S.) 314.

(2) B. L. R., Sup. Vol., 602.

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the same view had been taken. *Rajah Tek Narain Singh v Furlong* (1) is an earlier case to the same effect. The plaintiff's remedy was by a separate suit. *Baboo Gour Kishan Singh v. Sahay Fukeer Chund* (2), *Baboo Issur Dutt Singh v. Alluck Misser* (3), and *Protap Chundra Burua v. Rani Swarnamaye* (4). The words "payable in respect of the subject-matter of the suit." used in s. 11, must be understood to mean "payable under the decree;" see the explanation of Phear, J., in *Haramo-hini Chowdrain v. Dhanmani Chowdrain* (5). [SIR M. SMITH.—Does not this construction make the second clause of the section illusory? The first clause of s. 11 seems to cover both s. 196 and s. 197 of Act VIII, and the second clause to point to something more. "Payable" as used there rather excludes the idea of a decree. If there be a direction for payment in the decree, there could be no separate suit, and the prohibition of a separate suit by the section would be unnecessary. The section may be taken to indicate that the increment to the subject-matter, as in the case of mesne profits, where a man has been kept five years out of possession after recovering a judgment, ought to go with the subject-matter, whether that has been provided for by the judgment or not.] If that were so it might lead to a conflict between the Court giving the decree and the Court executing the decree. The execution Court might in all cases give what the Court trying the case did not intend to be given, and what the plaintiff himself had not asked for. [SIR M. SMITH.—It is difficult to conceive a case in which mesne profits would not properly be payable from the date of decree to the date of obtaining possession.] The decisions of the Calcutta High Court are mostly in our favor. The earlier Madras decisions, which may be thought to favor the appellant, have been overruled in *Subba Venkataramaiyan v. Subraya Aiyar* (6); and the Full Bench ruling of the Bombay High Court in *Radhabai v. Radhabai* (7), similarly overrules an earlier decision of that

(1) 2 W. B., Mis., 4.

(4) B. L. R., F. B., 113.

(2) 7 W. R., 364.

(5) 1 B. L. R., A. C., 138.

(3) *Id.*, 429.

(6) 4 Mad. H. C. R., 267.

(7) 4 Bom. C. R., A. C., 181.

• Court see also *Sitaram Amrut v. Bhagvant Jaganath* (1). The judgment of the High Court of the N. W. Provinces in *Oonkur Dass v. Heera Singh* (2) has likewise been overruled by the latter decisions in *Chowdhree Nain Singh v. Jawahur Singh* (3) and *Hur Churn Lal v. Toorab Khan* (4). There is thus a complete *consensus* in the rulings of all the Courts in India.

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We are next to see whether the facts of the case or the conduct of the parties take it out of the construction of these decisions. The terms of the decree do not provide for subsequent mesne profits. When execution was applied for in 1864, the respondent did not admit his liability to be assessed for such mesne profits in execution proceedings. In his counter-petition of the 14th October of that year he offered a compromise, but he stated that the case was one which it would be just to settle by regular suit. [SIR M. SMITH.—I do not understand him to dispute jurisdiction, but merely to suggest a preferable procedure. SIR J. COLVILLE.—What do you say was the effect of the security bonds? Do they not estop you? Are they not contract on your part to abide by the determination of the Court?] In the Courts below the appellant does not put his case on the bonds. Throughout the proceedings he relies on his right to have execution under the decree. He does not rely on any right he gets by the bonds. It might be a question how far the agreement or conduct of the parties could in any case affect their position; see the remarks of Markby, J., in *Elkouri Singh v. Bijaynath Chattapadhyaya* (5). The fact that the defendant was compelled by the Court to give security for subsequent mesne profits, cannot extend the rights of the plaintiff. These bonds can only secure the payment of what is ultimately payable under the decree. If subsequent mesne profits are not payable under the decree, they are not payable under the bonds. The plaintiff is not bringing an action on the bonds, but seeking execution of his decree. The last bond only was the act of the present respondent. The previous bonds were given by his father, and

(1) 6 Bom. H. C. R., A.C., 109.

(3) 1 All. H. C. R., 167.

(2) 1 Agra H. C. R., 141.

(4) 2 All. H. C. R., 176.

(5) 4 B. L. R., A.C., 111.

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he is not liable on these. The security was applied for by the plaintiff. He might have had immediate possession by enforcing execution, but he preferred to take security for what he erroneously assumed he would ultimately be entitled to recover. This he did at his own risk, and in the face of an express assertion by the defendant in his counter-petition of the 20th December 1859, that mesne profits could not be recovered under the decree as made. The proceedings of the Court under which these bonds were taken were irregular. When the Judge has pronounced his decree, he is *functus officio*. He has no power to alter his decree. If the security bonds were to be considered as orders of the Court modifying its decree, they would be *ultra vires*. The acts of the parties would not give the Court jurisdiction to do what it would not have jurisdiction to do without these acts. Consent cannot give jurisdiction. By consent the parties might make an agreement on breach of which an action might be brought. [SIR J COLVILLE.—Might there not be a consent order?] It is submitted not; the Court of execution can only execute the decree made by the Court trying the case. The proceedings of the Court under which a commissioner was appointed and mesne profits were assessed were likewise invalid, because the Court had already exhausted its powers in issuing the order of the 4th January 1865, for execution of what was provided for in the decree. This order limits execution to the mesne profits prior to the date of suit, and excludes those subsequent. The appellant accepted the order in these terms. If he objected to the restriction, he should have asked for an amendment of the order. If there is any hardship to the plaintiff from limitation having run against his remedy, he has brought it on himself. The claim for interest on the mesne profits is even less tenable than that for the mesne profits. There was no order for interest in the decree; it is not provided for in the bonds; it was disallowed by the commissioner and in the final order of the Civil Court. The respondent has never admitted liability in respect of it. If the plaintiff were suing for the mesne profits, he could not recover interest—*Chaku Mopdan Isana v. Dullabh Dwarka* (1).

Mr. *Leith* in reply :— The object of s. 11, Act XXIII of 1861 is to prevent multiplication of suits. It is plainly intended to give the Court of execution power to award mesne profits in cases not covered by ss. 196 and 197, Act VIII of 1859. That was the construction put upon it by the Madras Courts at the time when the defendant obtained stay of execution on giving security. The transaction under the security bonds is one to which the Court is a party. It was competent to the Court either to give possession or to take security. We deny that the Judge is *functus officio* when the decree is pronounced. The security taken by the Court may be enforced by the Court.

In bringing evidence before the commissioner as to the amount of the mesne profits, the defendant affirmed the authority of the Court to determine the question.

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Cur. adv. vult.

The judgment of their LORDSHIPS was delivered by

SIR J. W. COLVILLE.—Shunmooga Pillai and Chiddunbrun Pillai were cousins, and the only members of a joint and undivided Hindu family. Shunmooga died first, and in 1858 the appellant, claiming to be his adopted son, brought a suit to enforce his rights against Chiddunbrun, who denied the validity of the alleged adoption. The suit was in its nature one to establish the plaintiff's title as the heir of his adoptive father, and to obtain a partition of the joint family estate. It specifically claimed the mesne profits of the landed property from the date of the alleged exclusion,—that is to say, from the Fusli year 1267, corresponding with 1857-58; but did not claim mesne profits for the subsequent year. On the 11th of June 1859, the Civil Judge of Cuddalore made a decree in the plaintiff's favor, which affirmed his title as adopted son of Shunmooga, awarded to him a moiety of the joint estate, including certain lands and the sum of rupees 4,995-6-7½ as his share of the mesne profits of such lands for the Fusli year 1267, but was silent as to the mesne profits which had accrued since the institution of the suit. Both parties appealed against this decree to the Sudder Court of Madras,

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which, by its decree dated the 24th of September 1860, dismissed the defendant's appeal and modified the decree of the Civil Court by awarding to the plaintiff a further sum of Rs. 3,494-4-1 as the value of his share in certain jewels and other moveable property. It left the decree of the Civil Court untouched in respect of the mesne profits of the immoveable property. The defendant appealed against the decree of the Sudder Court to Her Majesty in Council. His appeal abated on his death in 1862, but was revived by his son, the present defendant and was finally dismissed by an order in Council in February 1864. This antecedent litigation, therefore, has conclusively established the title of the plaintiff to whatever he can claim under the decree of the 11th of June 1859 as varied by that of the 24th September 1860.

In September 1864, the plaintiff commenced the proceedings, out of which this appeal has arisen, in order to obtain execution of the decree made in his favor. By his petition he prayed to be put into possession of his share of the lands; to have execution for the ascertained sums awarded to him by the decree, including the mesne profits for the Fusli year 1267, with the interest thereon; and also to have execution for the two further sums of Rs. 48,075-14-1, and 15,890-15-7, the first being the alleged amount of mesne profits for the six years from Fusli 1268 to Fusli 1273; and the latter the estimated amount of interest due on such mesne profits. He has been put into possession of his share of the lands, and may be assumed, subject to what may be said hereafter touching his share of the outstanding debts due to the joint estate, to have obtained all to which he can be entitled under the decree except the two last mentioned items, or such other sums, if any, as may be due to him for the mesne profits for the years in question, and interest thereon. His claim to such subsequent profits and interest was litigated between him and the respondent in the proceedings which will be hereafter more particularly considered. The result of these was an order of the Civil Court, dated the 31st of January 1872, which awarded to the plaintiff the sum of Rs. 36,223-6-2 for mesne profits but rejected his claim for interest thereon, Against that order both parties appealed, the plaintiff insisting

that he was entitled to more than had been awarded to him for mesne profits, and also to interest on such profits ; the respondent for the first time contending that inasmuch as the mesne profits in question were neither asked for in the plaint, nor awarded to the plaintiff in the decree, the Civil Judge had no jurisdiction to award them under s. 11 of Act XXIII of 1861, the enactment under which he had proceeded, and taking other objections to the order.

On the 28th of June 1872, the High Court of Madras disposed of these appeals by reversing the order of the Civil Court on the ground that, under the decree in the original suit, mesne profits subsequent to 1858 were not recoverable. The present appeal is against the last mentioned order.

The first question to be considered is the construction to be put upon the 11th section of Act XXIII of 1861, of which the material portion is in the following words:—"All questions regarding the amount of any mesne profits which, by the term of the decree, may have been reserved for adjustment in the execution of the decree, or of any mesne profits or interest which may be payable in respect of the subject-matter of a suit, between the date of the suit and the execution of the decree, and any other questions arising between the parties to the suit in which the the decree was passed, and relating to the execution of the decree, shall be determined by order of the Court executing the decree, and not by separate suit and the order passed by the Court shall be open to appeal."

It is contended, on behalf of the appellant, that the words "all questions regarding the amount of any mesne profits or interest which may be payable in respect of the subject-matter of a suit between the date of the suit and the execution of the decree," are wide enough to embrace, and ought to be taken to embrace, the claims now under consideration. On the other hand, the learned counsel for the respondent insist that the word "payable" is to be read as "payable under the decree," and have cited numerous cases to show that, notwithstanding some earlier decisions to the contrary, all the High Courts of India have now accepted as settled law these propositions: 1st, that where the decree is silent touching interest or mesne profits

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subsequent to the institution of the suit, the Court executing the decree cannot, under the clause in question, assess or give execution for such interest or mesne profits; and 2nd, that the plaintiff is still at liberty to assert his right to such mesne profits in a separate suit. That this construction has now for several years prevailed in the High Court of Calcutta is shown by the Full Bench ruling of the 13th of September 1866—*Moosoodun Lall v. Bheekaree Singh* (1); the decision of the 18th of June 1868—*Haramohini Chowdhraim v. Dhammani Chowdhraim* (2); and numerous other cases. That it has been adopted by the other High Courts is shown: as to that of the North-West Provinces, by the decision of the 10th of November 1869—*Ohowdhree Nain Singh v. Jowahur Singh* (3); as to that of Madras, by the ruling of the 12th of February 1869—*Subba Venkataramaiyan v. Subroya Aiyar* (4); and as to that of Bombay, by the Full Bench ruling of the 10th of December 1867, in *Radhabai v. Radhabai* (5), followed by the decision of the 15th of June 1869 in *Sitaram Amrut v. Bhagwant Jagmuth* (6).

The alleged *consensus* of the Indian Courts being thus established, their Lordships, whatever their opinion upon the construction of this clause might have been, had the question been *res integra*, do not think it would be right to run counter to so long a course of decision upon what is, in fact, merely a question of procedure,—it being admitted that the plaintiff may assert rights of this nature, if they exist, in a separate suit. They, therefore, accept the construction of the Indian Courts as settled law; and that acceptance, as was admitted at the bar, suffices to dispose of the claim to interest on the subsequent mesne profits which is raised by the present appeal.

It was, however, contended, as to the principal of the mesne profits in question, that the special circumstances of this case take the plaintiff's claim out of the general rule, and are sufficient to support the order of the Civil Court of the 31st of January 1872. And their Lordships will now proceed to consider what those circumstances are and the legal effect of them.

(1) B. L. R., Sup. Vol., 602.

(2) 1 B. L. R., A. C., 138.

(3) 1 All. H. C. R., 167.

(4) 4 Mad. H. C. R., 257.

(5) 4 Bom. H. C. R., A. C. 181.

(6) 6 Bom. H. C. R., A. C., 109.

The decree of the 11th of June 1859 conclusively established the right of the plaintiff as against the defendant to a share in the lands forming part of the joint estate, and to the mesne profits attributable to that share for the Fusli year 1267, being the year next preceding the institution of the suit. His title, therefore, to the lands, of which he has obtained possession, and to mesne profits on those lands from a certain date, cannot be impugned. Had there been no appeal, and the decree had been followed by immediate execution, the plaintiff would have been put into possession of his lands, and would ever since have received the rents and profits of them. The only mesne profits touching which any question could have arisen, would have been those for the year which elapsed between the date of the institution of the suit and that of the decree. Execution was suspended, but not necessarily suspended, by the appeals, and the defendant could only remain in possession on the terms of giving security for the execution of the decree, should it be affirmed against him.

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Such being the legal position of the parties, the plaintiff, on the 8th of December 1859, presented a petition to the Civil Judge of Cuddalore, claiming, in addition to the mesne profits specifically given by the decree, a certain sum as the then ascertained mesne profits for the Fusli year 1268 (being that which immediately followed the institution of the suit), and a further sum for the mesne profits not yet ascertained for the Fusli year 1269; and praying that, should the defendant fail to give security for the subsequent profits, security to abide the event of the appeals should be taken from the plaintiff, and that he should be allowed to take out immediate execution. A counter-petition was filed, and other proceedings had; but ultimately an order of the Court was made, under which the defendant executed the instrument of the 26th of January 1860.

The Sudder Court made its decree disposing of the appeals in September 1860; and on the 11th of December in that year the plaintiff, contemplating the possibility of the appeal to Her Majesty in Council, which was afterwards preferred, made a second application to the Civil Court of Cuddalore, praying that the defendant might give further security to cover both the

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additional sum awarded to the plaintiff by the decree of the Sudder Court, and the mesne profits of the lands for the current Fusli year 1270; and that in default of his doing so, security to abide the event of the appeal might be taken from the plaintiff, and he be allowed to execute the decree. Upon this second application an order of the Court was made, under which the defendant executed the further security of the 19th of March 1861.

The original defendant died, and the appeal was revived by the respondent as his son and heir some time in 1862.

On the 29th of January 1863, the plaintiff applied again to the Civil Court of Cuddalore, praying that the respondent, as the heir of the original defendant, should give security for the mesne profits for the Fusli years 1271 and 1272, with the usual alternative that, if he should fail to do so, security to abide the event of the appeal should be taken from the plaintiff, and he be allowed to have execution. On this application an order of the Court was made, under which the respondent executed the document dated the 25th April 1863.

That instrument is addressed to the Civil Court of Cuddalore, is entitled "a ready-money security bond respectfully executed by the respondent as son and heir of the original defendant," and is in these words:—

"Pursuant to the order passed by the Court requiring me to furnish security for the two Fuslis 1271 and 1272, the probable amount whereof has been put down at Rs. 9,880-12-11 for both the Fuslis, in original suit (O.S.) No. 1 of 1858 of the said Civil Court, I agree to pay up the same when the original decree comes to be executed. Failing to do so, I consent to my property here under mentioned being proceeded against, and the amount recovered. Deducting, therefore, from the said amount of Rs. 9,880-12-11, Rs. 4,616-15-11, which is the surplus in the security furnished in 1270, the remainder is Rs. 5,264-13-0; for this amount I give you a security lien upon the property hereunder mentioned, and indisputably belonging to my share." Then follows a list of property.

The two former instruments executed by the original defendant are substantially to the same effect. They are also addressed

to the Civil Court; they contain an obligation to pay subsequent mesne profits for the years which they respectively cover and point even more plainly to the ascertainment of the amount of such profits when the decree should come to be executed, and to their realization, if not then paid, by the Court. The effect then of each document seems to be an undertaking on the part of the person executing it, and that not by a mere written agreement between the parties, but, by an act of the Court that in consideration of his being allowed to remain in possession pending the appeal, he will, if the appeal goes against him, account in that suit, and before that Court, for the mesne profits of the year in question. That such was the understanding of the parties is shown by earlier proceedings in execution, and in particular by the respondent's counter-petitions of the 13th of October 1864 and the 25th of April 1868. By the first of these the respondent, not disputing his liability for the six years mesne profits claimed, though he did dispute his liability for interest thereon, offered terms of compromise, and only suggested that the account, by reason of its complexity, would be better taken in a regular suit. The second contains this statement:—"The plaintiff now claims mesne profits for the years subsequent to the decree. Though this petitioner is bound to pay the same, still the amount asked by the plaintiff is excessive, and has been fixed by him at his pleasure;" and then follows a plea *ad misericordiam*. The objection now taken to the recovery of these subsequent mesne profits by proceedings in execution was first taken by the respondent in the ground of appeal filed by him in May 1872. That the respondent should have come under the obligation supposed; that the plaintiff should have failed to apply either to the Civil Court or to the appellate Court for the amendment of the original decree by making it a decree for mesne profits subsequent to institution of the suit; and that the respondent should have omitted, whilst the proceedings in execution in the Civil Court, to take the objection now taken to them, are all circumstances which the fact that up to December 1867 the wider construction for which the appellant contends was put upon the 11th section of the Act of 1861 by the Courts of the presidency of Madras, and regulated

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their practice, goes for to explain. But if the respondent has contracted an obligation to account in this suit for the subsequent profits claimed, he cannot escape from it, because when he contracted it the course and practice of the Courts proceeded upon a construction of a Statute which has since been pronounced to be erroneous.

Their Lordship will now consider some of the objections which have been taken to the conclusion that the respondent has, by the proceedings in question, incurred the obligation supposed.

It was said that the last (so-called) "security bond" was alone the act of the respondent, and a distinction was taken between the obligation under that and those incurred by his father under the two other instruments. Their Lordships, however, observe that these are not mere bonds of the father, in respect of which the respondent as heir might be liable in the ordinary way. They are proceedings in Court imparting a certain liability to be enforced in the suit against the defendant to that suit. By reviving the appeal, the respondent substituted himself for his father as defendant in the suit; and assumed the position of defendant with all the rights and liabilities which had previously attached to it. And that he intended to do so is further shown by the claim in his security bond to take credit for a sum which he alleged to be surplus security given by the preceding bond.

Again, it was suggested that the proceedings in the lower Court, which resulted in these security bonds, were irregular; that after the appeal to the High Court the power to allow or to suspend execution, and, in the latter case, to fix the terms on which execution should be suspended, belonged solely to the Appellate Court. Their Lordships are by no means clear that this objection is well founded; but whether it be so or not, it comes too late. It was never taken in the lower Court where the proceedings were had. There was no appeal from the orders of that Court, which directed security to be given. It would be in the highest degree unjust to allow such an objection now to prevail against the appellant.

Again Mr. Norton argued that the proceedings of the Civil

Court of Cuddalore in the appointment of the commission and the assessment of the mesne profits were irregular, because its powers were spent, at all events as to the mesne profits, by the execution issued by Mr. Ellis, the then Judge, in January 1865. Their Lordships can see no ground for this objection. It would seem that the intention of the Court, whether under Mr. Ellis, or his successor, Mr. Hodgson, was to give the plaintiff execution as prayed by his petition, but to give it piecemeal, and as it could conveniently be given. The order in question gave him execution for the ascertained sums to which he was entitled under the decree. In December 1865, he was under a later order put into possession of the land. The amount of the subsequent mesne profits could only be ascertained by inquiry. The same proceedings would probably have been had if the decree had expressly given the mesne profits subsequent to the institution of the suit under s. 196 of the Code of Procedure.

Upon the whole, their Lordships are of opinion that the respondent, by the proceedings in question, did come under an obligation to account in this suit for the subsequent mesne profits of the appellant's land which was capable of being enforced by proceedings in execution, notwithstanding the construction of the 11th section of the Act XXIII of 1861, which now prevails in Madras. They conceive that this liability made the accounting "a question relating to the execution of the decree" within the meaning of the latter clause of the section. But even if it did not, they think that upon the ordinary principles of estoppel the respondent cannot now be heard to say that the mesne profits in question are not payable under the decree. Nor do they feel pressed by the observations made by Markby, J., in the case of *Ekowri Singh v. Bijaynath Chattapadhyaya* (1).

The Court here had a general jurisdiction over the subject-matter, though the exercise of that jurisdiction by the particular proceeding may have been irregular. The case therefore seems to fall within the principle laid down and enforced by this Committee in the recent case of *Pisani v. The Attorney-General of Gibraltar* (2), in which the parties were held to an agreement

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(1) 4 B. L. R., A. C., 111.

(2) L. R., 5 P. C., 516.

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that the questions between them should be heard and determined by proceedings quite contrary to the ordinary *cursus curiæ*.

From what has been said it follows that, in their Lordships' opinion, the order of the High Court, which is under appeal, ought to be reversed. Their Lordships would have felt great regret in coming to the contrary conclusion. That proceedings begun in 1864, and for several years carried on without objection, should in 1875 be pronounced infructuous on the ground of irregularity, and the party relegated to a fresh suit in order to assert an indisputable right, would be a result discreditable to the administration of justice. In such a suit the plaintiff would probably find himself, either successfully or unsuccessfully, opposed by a plea of limitation. If such a plea were successful, great injustice would be done to the plaintiffs; if it were unsuccessful, the respondent would probably find himself in a worse position than that in which he will be placed by the allowance of this appeal; since in such a suit the plaintiff might recover interest.

With the claim for interest made by the present appeal their Lordships have already dealt. They can see no grounds for the other objections taken by the appellant to the order of the Civil Court. They are of opinion, in particular, that, in the circumstances of the case, that Court could not have dealt otherwise than it has dealt with the plaintiff's share in the outstanding debts. On the other hand, the respondent has not insisted on any of the objections taken in his grounds of appeal to the High Court other than that on which the High Court made its order. Their Lordships, therefore, will humbly advise Her Majesty to reverse the order of the High Court of the 28th of June 1872, and in lieu thereof to order that the appeal against the order of the Civil Court of Cuddalore of the 31st of January 1872 do stand dismissed and the said order affirmed, and that each party do pay his own costs, both of the appeal to the High Court and of this appeal.

Appeal allowed.

Agents for the appellant: Messrs. *Williamson, Hill and Co.*

Agents for the respondent: Messrs. *Gregory, Rowcliffes and Rawle.*

APPELLATE CIVIL.

Before Mr. Justice Macpherson (Offg. Chief Justice) and Mr. Justice Pontifex.

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March 9.

GOCOO LANUND DASS (ONE OF THE DEFENDANTS) v. WOOMA DAE (PLAINTIFF).*

Hindu Law—Mitakshara—Adoption of Stranger where there is a Brother's Son—Succession of Daughters—Childless Widowed Daughter.

By the Hindu law, the adoption of a stranger is valid notwithstanding the existence of a brother's son at the time of the adoption.

Smells.—According to the Mitakshara law, a married daughter, with male offspring, is entitled to inherit in preference to a sonless widowed daughter.

The plaintiff, Wooma Dae, styling herself the "widowed daughter and heiress of Hulodhur Dass Mohapatter," alleged that her father died on the 25th Aghran 1278 Aml (3rd December 1870,) leaving herself and a younger sister, the defendant Parbutti Rai, but no male issue; that Parbutti was married and in affluent circumstances, but that she herself, the preferential heir to her father under the Mitakshara law, was a childless widow, indigent and helpless; that, on her father's death, the defendant Gocoolanund Dass falsely alleged himself to be the adopted son of her deceased father took possession of the lands and effects left by her father, succeeded in getting a certificate under Act XXVII of 1860 from the district Judge, and procured the registration of his name as the proprietor of some of the lands claimed in the suit. Hence she brought this suit for a declaration of her right and the cancellation of the certificate granted to Gocoolanund, and to recover possession of the properties, real and personal, mentioned in the plaint, making Gocoolanund and Parbutti defendants.

Gocoolanund's defence was that he had been properly taken in adoption by the plaintiff's father who had brought him up from a child; that he had been adopted before the birth of the plaintiff;

*Regular Appeal, No. 1 of 1874, against a decree of the Subordinate Judge of Zilla Cuttack, dated the 15th September 1873.

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 WOOMA DASS. that he had ever since lived with his adoptive father, and had managed all his zemindari affairs since attaining his majority for about 24 years; that the plaintiff was aware of the fact of the adoption; and that the plaintiff was not entitled to her father's property under the Hindu law, being an indigent and childless widow. He also stated that his adoption was proved before the District Judge when he applied for and obtained a certificate under Act XXVII of 1860; that no objection was then made to his adoption, and that the suit was brought at the instigation of Hurhur Dass, the grandson of Juggernath Dass the elder brother of Hulodhur Dass although Juggernath Dass and Hurryhur's father Denobundhoo Dass had for years acquiesced in his adoption.

The defendant, Parbutti Dass, stated that the plaintiff had no legal claim to her father's property being a childless widow, and that her father had given her a sum of money and had provided for her maintenance. She contended that she, Parbutti, was entitled to succeed to the property which belonged to her sons by right of succession.

Issues were raised as to the fact of the adoption, and as to its validity and effect, if duly made. And an issue was also raised in case the adoption was not made, or if made was not valid, as to which of the daughters was entitled to succeed.

The parties were subject to the Mitakshara law. It was admitted that Hulodhur had, at the time Gocolanund was said to have been adopted, a nephew living, named Denobundoo, the only son of Hulodhur's brother.

The Subordinate Judge held that, although there was evidence to show that Gocolanund was brought up by Hulodhur, it was not proved that he had been adopted, or that the ceremony of *Putreshjug* was performed. He further was of opinion that, even if the adoption had taken place, it was invalid, owing to the existence of a nephew, whom Hulodhur would be bound according to the Dattaka Mimamsa to adopt.

From this decision the defendant Gocolanund Dass appealed.

Mr. Woodroffe (with him Baboos Srinath Dass, Chunder Madhub Ghose, and Radhica Churn Mitter) for the appellant.

Baboo *Annoda Pershad Banerjee* and *Mohesh Chunder Chowdhury* for the respondent.*

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Mr. Woodroffe.—Irrespective of the questions raised respecting the defendants' adoption, the plaintiff's claim, as an indigent widowed daughter to succeed to the estate of her father, in preference to her sister who is married and wealthy, cannot be sustained in law. The right of daughters to inherit, and the order in which, as amongst themselves when there are different classes of daughters, they succeed to such inheritance, are commented upon by the author of the *Mitakshara* in the second chapter of that work, see *Mitakshara*, Ch. ii, s. 2, § 1—4. The two, and only two, classes of daughters recognized by him in those sections as having a right to the paternal inheritance are—(1) the maiden, (2) the married and as between the members of each of these classes inter se, there is a further division into (a) unprovided, (b) enriched.

The texts above referred to, and they are the only passages to be found in the *Mitakshara* dealing with the daughter's right of succession to the father's estate, make no allusion to the succession of childless widows to such estate, unless indeed it be contended that by the term "unprovided" the author meant to include daughters destitute of sons and the possibility of giving birth to male issue, i.e., childless widows as well as daughters unprovided with property. Such an interpretation seems unwarranted by, if not inconsistent with, the context, and is absolutely without meaning when applied to the class of maiden daughters. In the *Viramitradya*, a work of great and recognized authority in the Benares school (see *Gridhari Lal Roy v. The Government of Bengal* (1), per Sir James Colvile, and *Amrita Kumari Debi v. Lukhinarayana Chuckerbutty* (2), per Mitter, J.), the term "unprovided" is explained as follows:— "Amongst the daughters also, first the unmarried daughter takes the paternal property; in default of her, the married daughters: amongst these also, first the unprovided, and in their absence the provided:—all, however, who are in the same predicament,

(1) 12 Moore's I. A., 466.

(2) 2 B. L. R., F., B. 28; see p. 42.

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take the property dividing it equally amongst themselves. This rule is established. Accordingly, Katyayana says:—“The wife who is chaste gets the wealth of the husband. In her default, the daughter, if she be then unmarried.” Gautama says:—“Woman’s property goes to daughters unmarried and unprovided ones.” ‘Unprovided’ means indigent. Although woman’s property is here mentioned still the reason being the same, it also applies to paternal wealth. The interpretation—that the term ‘unprovided’ signifies one destitute of offspring by reason of barrenness and the like,—is not reasonable; because her succession does not take effect by reason of the absence of spiritual benefit through sons.”

With this explanation, the *Smṛiti Chandrika*, a work of considerable repute in Southern India, where it ranks next in estimation after the *Mitakshara* which is there as in Benares the prevalent authority, will be found to accord. The author of this work, in dealing with the rights of daughters to succeed to the paternal estate, thus expounds the law. “By this,” a text of Katyayana set out in the preceding para, “it is impossible that paras. 3, 7, and 9 have reference to daughters either married or unprovided.” “Unprovided” here means unprovided with wealth; and not unprovided with offspring, such as barren daughters and the like, for daughters of the latter description are not entitled to inherit their deceased father’s estate at all, they being incapable of conferring upon him spiritual blessings through the medium of offspring, *Smṛiti Chandrika*, ch. xi, s. ii, § 21; see also § 28.

The same interpretation is, it is well known, placed on this term “unprovided” by Jimuta Vahana, *Dayabhaga*, ch. xi, s. ii, § 3, and Srikrishna Tarkalankara, *Dayakrama Sangraha*, ch. i, s. 3, § 5. In truth, there is not, although the contrary has been affirmed by European text writers of eminence, any difference between the Benares, the Madras, and the Bengal schools on this point. All alike exclude widowed sonless daughters from succeeding to the paternal estate. The author of the *Mitakshara* undoubtedly does in one place, ch. ii, s. ii, § 13, whilst treating of the succession to *stridhun*, explain the term “unprovided” as meaning “such as are destitute or wealth of

without issue," but this text is, it is submitted, of little or no weight in the decision of the point now before the Court namely the succession to the paternal estate, the right of succession to which stands upon somewhat different principles to those which regulate the right of succession to stridhan, which is more or less of an exceptional character. On the other hand, there seems a consensus of authority on the part of the native text writers of all schools against the succession of a childless widowed daughter to her father's estate, and the report of cases decided in this Court, in the North-West provinces, or in Madras, appear to contain no instance of such succession.

Weight will no doubt be placed upon the passage in Macnaghten's treatise, in which it is stated that a daughter, who is married and has or is likely to have issue, is not preferred to one who is widowed and barren, Macnaghten's Hindu law, p. 22. This exposition of the doctrine of the Benares school is, it is submitted, utterly unsupported by the authorities to which Mr. Macnaghten makes reference, but has however been frequently put forward by other writers upon Macnaghten's authority, for instance, by Norton and Strange. Even granting that a childless widowed daughter may inherit her father's estate, she is, it is submitted, postponed to both the maiden and married daughters having or likely to have issue. Adopting this view, Norton states the order of succession thus:—"Where there are several daughters, they take in the following order:—first, maiden; secondly, married with male issue, or probability of having it; and widows with male issue. The three latter classes inherit jointly," Norton's Leading Cases on Hindu law, Pt.ii, p. 515. Strange it will be observed, lays down the same order of succession in his Manual, para 329.

The authorities cited are destructive of the plaintiffs supposed right, upon the strength of which alone, and not upon any defect in the defendants' title, is she entitled to succeed. They establish that, as a widowed childless daughter, she has no right, or at least no preferential right by reason of her alleged indigence to succeed to her father's estate.

As to the factum of the defendants adoption with all the necessary ceremonies, there can hardly be any reasonable doubt

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The Subordinate Judge is in error in holding that the existence of a nephew, who was the only son of the plaintiff's father's brother, rendered the defendants' adoption invalid. There is nothing in the evidence to show that he could lawfully have been adopted. For aught that appears to the contrary he may have been over the proper age for adoption. The adoption of a nephew is not however compulsory. Such an adoption is strongly recommended no doubt, but if, despite such recommendation, a man adopts a stranger, the existence of a brother's son or other near relation who might have been adopted cannot invalidate the adoption so effected, Maonaghten's Hindu Law, Vol. i, pp. 68 and 69, and Stranges' Hindu Law, Vol. ii, pp. 74 and 75. In *Nanjama v. Akham* (3), a similar objection was taken and treated as being of no weight. And it may be observed that the plaintiff's own contention, with respect to the adoption of Radhakishen, shows that her advisers set little or no store by the supposed invalidating circumstance the existence of the nephew.

Baboo Anmoda Pershad Banerjee, for the respondent, after contending upon the evidence that the adoption of Gocoolanund was not proved, continued as follows:—Under the Mitakshara law, after the son, the wife, and then the daughters succeed, Mitakshara, ch. 2, a. 1, § 2. This is the text of Yajnavalkya, on which the Mitakshara is a commentary. Section 2 of the same chapter states in what order the daughters succeed, and the fourth verse lays down that, "if the competition be between an unprovided and an enriched daughter, the

(1) 2 Ind. Jur., O. S., 5.

(2) 2 B. L. R., Ap., 51.

(3) 4 Moore's I. A., 1; see pp. 79, and 112.

unprovided one inherits; but on failure of such, the enriched one succeeds; for the text of Gantama is equally applicable to the paternal as to the maternal estates. 'A woman's separate property goes to her daughters, unmarried or unprovided;' and the text of Gantama is given in ch. 2, s. 11, § 13:—
 "A woman's property goes to her daughters, unmarried or unprovided; 'or provided' as is implied by the conjunctive particle in the text. 'Unprovided' are such as are destitute of wealth or without issue." Under this text, as explained by the commentator, the plaintiff is entitled to succeed. Para. 15 says:—"On failure of all daughters, the grand-daughters," &c., take the succession. "All daughters" evidently would include the barren and the childless daughter.

The theory of succession under the Mitakshara is not based upon the conferring of spiritual benefits as it is in the Dayabhaga but it rests on relationship. In *Amrita Kumari Debi v. Lakshinaraayan Chuckerbutty* (1) the same view was taken. In *Bakuba v. Munchhabai* (2) it was held that the circumstance of having a son did not give a daughter a better right than one who had none. In *Poli v. Marotum Bapu* (3) the case of *Bakubai v. Munchhabai* (2) was followed, and it was held that comparative poverty is the only criterion for settling the claim of the daughters among themselves. In *Binode Koomeree Debee v. Purdhan Gopal Sahee* (4) the learned Judges say that, in Benares, no preference is given to a daughter who has or is likely to have male issue over a daughter who is barren or a childless widow.

The respondent's contention is supported by Macnaghten in his Hindu Law, Vol. i, p. 22, where, speaking of daughters, he says "and one who is married, and has or is likely to have issue, is not preferred to one who is widowed and barren." It was contended that this is wrong, but upon the authorities it is not so. Elberling too, whatever the weight to be attached to his opinion, supports Macnaghten; see Elberling's *Inheritance*, s. 169, p. 76. For the division by Norton of daughters into three classes there is no authority. He quotes the Mitakshara

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(1) 2 B. L. R., F. B., 28.

(2) 2 Bom. H. C. Rep., 5

(3) 6 Bom. H. C. Rep., A. C. 183.

(4) 2 W. R., 176; see 172.

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to make out the proposition that the barren and widowed daughter succeeds next after the other daughters; but there is nothing in the Mitakshara to support this. The Mitakshara is the only guide where it lays down the law. Where it is silent, it may be useful to see what the opinions of the Bengal and other schools are. Vira Mitrodaya and the author of Smriti Chandrika draw the inference that "unprovided" means unprovided with wealth, but this interpretation cannot be safely accepted in the absence of anything in the Mitakshara itself.

Then this adoption, if it did take place, would be invalid by reason of the existence of a nephew, Dattaka Mimansa, s. 2, vv. 28 and 29. This is on the authority of Menu, ch. 9, v. 182. Verses 37, 38, 39, 41, 53, 67, and 73 of the Dattaka Mimansa, s. 2, all tend to show that, where there is a nephew, no other person can be adopted. See also Mitakshara, ch. 1, s. 11, § 36. Macnaghten, pp. 74 and 75, Vol. i of the new edition, gives no authority for saying that the doctrine of factum valet prevails in the Benares school in regard to the selection of a son. Strange, Vol. i, p. 84, of the edition of 1830, says that the injunction of Menu has, in modern times, been construed as importing only an intention to forbid the adoption of others, where a brother's son is obtainable, but this could only be so if the doctrine of factum valet prevailed in the Benares school. Strange gives no authority that it does.

Baboo Mohesh Chunder Chowdhry on the same side.—Attri says that adoption can be made "by a man destitute of a son" only, see Dattaka Mimansa, s. 1, v. 3. The commentators say, even when a man has a grandson, he cannot adopt another, v. 13 of the same section; and it has already been shown that, according to Menu, if one of several brothers has a son that son, is the son of them all. In order to be able to adopt, a man must be *oputro* (without son); but if a man has a son or nephew, he is *putroban* (having a son). Yajna-
 valkyia says that a nephew takes the inheritance (Mitakshara, s. 1, s (2) after the wife and the brother. There is an apparent contradiction here, because, if he be a son, he must take with other sons; but this is reconciled by ch. 1, s. 2 § 36, which says

that Menu merely says this to forbid the adoption of any one while there was a nephew to be adopted. Thus Menu is reconciled with Attri. The gift of a son in such a case does not sever all natural connections. These relations already exist. Dattaka Mimansa, s. 2, v. 39. It was therefore no impediment to Hullothur adopting his nephew; that the nephew was the only son of his father. This is an exception to the rule that an only son cannot be adopted.

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Mr. Woodroffe in reply.—Even if it be conceded that daughters succeed to the paternal estate in the same order as to stridhun as contended for on behalf of the plaintiff, yet the texts relied on (1) by Baboo Annoda Pershad Banerjee are silent as to the right of widows. By the words “such as are without issue,” the author may not have meant to include any others than married childless daughters.

With respect to the cases cited, it will be observed that *Benode Koomaree Debee v. Purdhan Gopal Sahee* (2) merely decides that married daughters are not excluded from succession to the paternal estate by either the Dayabhaga or Mitakshara. The allusion to childless widows is merely obiter dictum and apparently a quotation from Macnaghten. As to the Bombay cases, it is doubtful whether *Bakubai v. Munchhabai* (3) involved the question of a widowed daughter's right of succession. The point for decision would seem to have been whether as between two married daughters, the circumstance that one had issue and the other none, gave the daughter who had issue a prior claim to the paternal estate. The Court held that it did not, and that the unendowed (*nirdhan*) daughter was to be preferred to the endowed (*sadhan*) irrespective of the question of issue. Certainly, if the marginal note be correct, Bakubai was not a widow when the inheritance opened to her, though at the time of the appeal she would appear to have been a widow. Indirectly this case lends support to the contention that the word *nirdhan* means without wealth and

(1) Mitak., Ch. ii. s. ii, § 4; and
v. 11, § 13.

(2) 2 W. R., 176.

(3) 2 Bom. H. C. Rep., 5.

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not without offspring. In *Poti v. Narotum Bapu* (1), the question seems hardly to have been discussed owing to the matter being deemed to be concluded by the case of *Bakubai v. Mun-*

The Bombay school is moreover in many points so divergent from that of Benares that but little weight can be given to these cases which are expressly stated by the Judges to have been decided by the law prevailing in Western India apparently as distinct from that obtaining in Benares and other places governed by the Mitakshara.

The judgment of the Court was delivered by.

MACPHERSON, J.—We agree with the Subordinate Judge in thinking it proved that the defendant Gocolanund for years (probably forty years or more) lived with and was brought up and treated by Hullothur as his son; also that he was given in marriage by Hullothur as his son. Moreover, we agree with the Subordinate Judge in deeming it clear from the documents which are in evidence that Gocolanund was constantly acknowledged by others as the adopted son of Hullothur, and was so styled by Hullothur himself in a written statement filed in Court in October 1848. In short we have no manner of doubt that no one disputed the fact that Gocolanund was Hullothur's adopted son, until after Hullothur's death. That being so, it is hardly necessary for us to consider whether it is likely that Hullothur would have wished to adopt under the circumstances in which he was placed. As the subordinate Judge has however laid much stress on the supposed improbability of his having so wished, we feel bound to say that we can see nothing which makes it in any degree improbable that the adoption took place as alleged.

It is objected, first that there is no proof of the necessary ceremonies having been performed; and second even if the adoption did in fact take place, it must be considered void, because one Denobundhee, the only son of a brother of Hullothur, was alive, and, being alive, Gocolanund could not lawfully be adopted.

(1) 6 Bom. H. C. Rep., 183.

(2) 2 Bom. H. C. Rep., 5.

As regards the performance of the ceremonies, the evidence seems to us sufficient. There is evidence of *homa* and *putreshjug*. It is said that this evidence is bad and unreliable, but it seems as good as we could expect to be produced to prove the performance of such ceremonies forty years ago, and we are satisfied with it. We, therefore, find as a fact that Hullothur did adopt Gocoolanund.

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Assuming the fact of the adoption, there is some difficulty as to its validity, Denobundhoo the son of a brother having been alive at the time, as there is something in the nature of authority to support the objection. But we have no evidence as to this Denobundhoo, what his age was at the time of Gocoolanund's adoption, whether he was married or unmarried, &c. Nor do we know whether his father would have permitted his adoption by Hullothur. This, however, we do know that Denobundhoo's father never considered that Denobundhoo's being in existence rendered the adoption of Gocoolanund invalid: for Denobundhoo's father himself treated Gocoolanund as the adopted son of Hullothur. Moreover, it is clear that none of the parties to this suit, when this litigation commenced, considered the adoption assailable on this ground; for they set up another adoption, that of one Radhakishen since deceased, whom they alleged Hullothur adopted about thirty years ago. If Denobundhoo's existence invalidated the adoption of Gocoolanund, it would have equally invalidated that of Radhakishen. But so far as the parties themselves are concerned, Denobundhoo's existence was never dreamed of as forming any obstacle. No doubt it is said by Mr. Sutherland (see his *Synopsis*, Stoke's Edition, p. 665), that the only son of a whole brother, if no other nephew exist for adoption, must be adopted by his uncle requiring male issue and is *dwyamushayana*, or son of two fathers. It is said that no man having a brother's son alive who can be taken as *dwyamushayana*, can adopt any other person.

According to the rules laid down in the Hindu law books, it is wrong to adopt an only son; but an exception is made in the case of an only son being adopted by his father's brother, when he becomes *dwyamushayana*, the son of both the brothers. And

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a special adoption of this kind is said to be proper, and one which ought to be made. But we do not think that the mere fact of the existence of a brother's son deprives the uncle of the right to adopt any one save that son, if the son's father refuse to give him in adoption. And even if the brother was willing, we incline to the opinion that the provisions of the Hindu law really go no further than to sanction the adoption of an only son (such an adoption being ordinarily bad) if the adoption is made by his father's brother, when he can become *dwyamushayana*. In all cases of adoption, and especially in a case such as this, where the adoption has been deemed good and apparently acquiesced in for many years by all the parties, we think that the rule which ought to be applied is that which is in fact usually followed, and is well indicated by Sir Thomas Strange in his work on Hindu Law, Vol. i, p. 85, where he says:—"The result of all the authorities is that the selection is finally a matter of conscience and discretion with the adopter, not of absolute prescription rendering invalid an adoption, of one not being precisely him who on spiritual considerations ought to have been preferred." Whatever may be the strict rule laid down by the texts of the old Hindu writers, and even supposing it to be what Mr. Sutherland states it is, there is no doubt that in practice Hindus are not in the habit of restricting their adoption in the manner now contended for.

As we uphold the adoption, it is not necessary for us to decide another question which has been raised, viz., whether the plaintiff has any right to maintain this suit at all. As at present advised, we are of opinion that the plaintiff could not in default of adoption be entitled to more than half of what she claims; that is to say, supposing she had any right at all, she could have only an eight anna's share, her sister Parbutti taking the other eight annas. But we are inclined to think that the plaintiff would have no title whatever, being a sonless widow: and we think that the law is correctly laid down by Mr. Justice Strange in his Manual, paras. 328, 329, p. 80, from which it appears that Parbutti would take in preference to the plaintiff. But it is not necessary to go into that point, as we find that the adoption was made in fact and is valid in law.

The result is that the decision of the Subordinate Judge is 1875
reversed, and the plaintiff's suit dismissed with costs in this GOCOOANUND
Court and in the lower Court. DASS
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Appeal allowed.

APPENDIX.

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—10—

Before Sir Richard Couch, Kt., Chief Justice, and Mr. Justice Morris.

**MUFTI JALALUDDEN MAHOMED (Plaintiff) v. SHOHORULLAH
(Defendant).***

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August 7.

*Court Fees Act (VII of 1870), Sch. ii, No. 17—Act VIII of 1859,
s. 246—Stamp.*

A suit brought under the provisions of s. 246 of Act VIII of 1859 to set aside an order allowing a claim to attached property and releasing the property from attachment is a suit to try the title and establish the right of the person who brings the suit; and such a suit must be valued according to the value of the property, and cannot be brought upon a stamp of Rs. 10, under No. 17 of Schedule ii of the Court Fees Act.

In this case the plaintiff, having obtained a decree, had attached certain property in execution of it as being that of the defendant against whom the decree had been obtained. A claim was preferred under s. 246 of Act VIII of 1859 by the present defendant Shohorullah, which was successful; and an order was made releasing the property from attachment. The plaintiff brought this suit, describing it as a suit to set aside the summary order,—*viz.*, the order releasing the property from attachment,—and the plaintiff was on a stamp of Rs. 10 only.

The Subordinate Judge who heard the case in the first instance appears to have doubted whether, in a suit with a stamp of that value, he ought to decide the question of title,—namely, whether the claimant who had been successful in getting the property released from attachment or the judgment-debtor was entitled to it. He, however, decided the question, and dismissed the suit.

Upon an appeal the Judge did not go into the question of title, but held, that the suit being brought on a stamp of Rs. 10 only, was not one in which a question of title could be determined, and said that the plaintiff was bound to bring a regular suit with a stamp according to the value of the property. The question raised on special appeal was, whether a suit brought

* Special appeal, No. 2565 of 1873, against a decree of the Officiating Judge of Zilla Sylhet, dated the 2nd August 1873, affirming a decree of the Subordinate Judge of that district, dated the 2nd December 1872.

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According to the provision at the end of s. 246 to establish the right of the person bringing it must have a stamp according to the value of the property or whether it was suit within No. 17 of the 2nd schedule of the Court Fees Act and required only a stamp of the value of Rs. 10.

Baboo *Aushotosh Dhur* for the appellant.

Baboo *Srimath Das* for the respondent.

The judgment of the Court was delivered by

CHURCH, C.J. (who, after stating the facts as above, continued).—I think that it does not come within that schedule, and that it cannot have a stamp of Rs. 10 only. It is not a suit merely to set aside the order. It is often described as such, but in reality it is a suit to try the title; to establish the right of the person who brings the suit, or the right of the judgment-debtor as against the claimant who has been successful.

We were told by the appellant's pleader that such suits were frequently brought with a stamp of Rs. 10. and were asked to enquire of the Deputy Registrar whether it is so or not. On the other hand we were told by the pleader for the respondent that such suits were always brought with a stamp according to the value of the property. It does not appear from the enquiry which I made that a suit of this description has ever been successfully brought on a stamp of Rs. 10 only, and the Deputy Registrar has furnished me with an instance of a Regular Appeal N. 238 of 1872, which was heard not long ago by myself and Jackson, J., and my lamented colleague, Mitter, J., in which the suit being exactly like the present and being described as a suit to set aside the summary order, the stamp was according to the value of the property. It was objected by the defendant in the first Court that it ought to have been brought on a stamp of Rs. 10 only, the defendant having an interest in reducing the valuation. The objection was overruled, and no question was raised as to the correctness of that ruling in the appeal before us.

I think the decision of the Judge is right, and that this appeal must be dismissed with costs.

Appeal dismissed.

VICE-ADMIRALTY JURISDICTION.

Before Mr. Justice Markby.

THE TRITON INSURANCE COMPANY v. THE MOORHILL.

*In re THE MOORHILL.*1875
July 12 & 13.*Arrest of Ship—Deposit of Security with Marshal—Application for Arrest of
Deposit in another Action.*

The ship *M*, having been arrested in an action promoted by the master of the ship *N*, for damage caused by a collision, in which the *N*, with her cargo, was totally lost, deposited with the Marshal of the Court certain Government paper as security to answer the alleged damage, on which the *M* was released. The cargo of the *N* had been insured, and on the loss thereof the Insurance Company paid the amount of the policy, and instituted proceedings against the *M* in respect of the loss of the cargo. Held, the Court had no power to grant an application by the Insurance Company for the arrest of the security in the hands of the Marshal, so as to make it answerable in their action.

APPLICATION for the arrest of certain Government securities in the hands of the Marshal of the Court.

The affidavit of J. R. Bullen-Smith, a member of the firm of Messrs. Jardine, Skinner and Co., agents of the Triton Insurance Company in Calcutta, stated:—That the Triton Insurance Company granted a policy for Rs. 11,000 in part of the value of certain teak timber shipped on board the *Natmoo* for a voyage from Moulmein to the Mauritius in August 1874; that on 19th September 1874, the *Natmoo* was run foul of by the *Moorhill* in the Bay of Bengal, whereby great damage was occasioned to the *Natmoo* by reason whereof she became water-logged, and was abandoned with the cargo of teak timber, and became totally lost; that the Insurance Company had paid the full amount of the policy to the owners of the cargo as for a total loss, and had thereby become entitled to all the remedies which the owners of the cargo had in respect of the said collision, loss and damage; that the *Moorhill* was arrested on 7th December 1874 by the Marshal of the Court to answer an action promoted by the owner of the *Natmoo* for damage done by the *Moorhill*, and on such arrest the master of the *Moorhill* deposited with the Marshal of the Court Government securities for Rs. 30,000 in lieu of the *Moorhill* to answer the said action: and that application had been made to the master of the *Moorhill* for payment of the said sum of Rs. 11,000, but without success.

The application was in terms of the action book filed on behalf of the Insurance Company, viz., "to arrest the Government securities of the 4 per cent. loan of the nominal value of Rs. 30,000, deposited with the Marshal of the Court, as security in place of the ship *Moorhill* when arrested on 7th

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December 1874 to answer a certain cause of damage, civil and maritime, promoted by one A. McDermott, the owner of the late ship or vessel the *Natmoo*, and which Government securities now remain in deposit with the said Marshal, and cite all persons in general who have or pretend to have any right, title or interest therein to appear on the 8th day after the arrest to answer the Triton Insurance Company, the underwriters of the cargo of the vessel the *Natmoo*, in a cause of damage, civil and maritime."

Mr. *Lowe*, in support of the application, submitted that the Government securities in the hands of the Marshal must be taken to be in the same position as the ship would be in, if here. They may be taken to represent the *res* for the purpose of founding a proceeding *in rem*. There is no direct authority, but the cases in which questions have arisen regarding the right to surplus proceeds of sale of ships sold by the Marshal under admiralty decrees, are somewhat analogous. These cases show that parties interested have the same remedies against the proceeds in the hands of the Marshal as against the ship; see *Cootes's Admiralty Practice*, pp. 12 and 97 and *The Sagacen* (1). The principle of those cases may be applied to the present application. As to the consequences of arrest, see *Cootes's Admiralty Practice*, p. 17.

Cur. adv. vult.

MARKBY, J.—This application to arrest the Rs. 30,000 now deposited with the Marshal as security in place of the ship *Moorehill*, which had been arrested in a suit of damages against that ship, must be refused. The applicant claims to have the right to proceed against the *Moorehill* in respect of certain injuries to the cargo, but his affidavit shows that this sum of Rs. 30,000 is held in deposit in lieu of the vessel to answer the damage in another suit. This is not like the proceeds of a ship which has been sold, and which possibly might be arrested in a second suit. This is money deposited to answer the damage on a particular suit; and I have no power to make it answerable for the damage in another suit.

Application refused.

Attorneys for the promotees: Messrs. *Barnes, Sanderson, and Upton*.

(1) 6 Moore's P. C., 56, at p. 75.

Before Sir Richard Couch, Kt., Chief Justice, and Mr. Justice Ainslie.

POONOO BIBEE (PLAINTIFF) v. FYEZ BUKSH (DEFENDANT).*

*Contract Act (IX of 1872), ss. 24, 25, & 27—Post-Nuptial Contracts—
Contract partly Legal and partly Illegal—Mahomedan Law.*

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The defendant, a Mahomedan husband, executed a kabinnama in favor of his wife, by which he agreed, among other things, that he would maintain her and make over to her whatever money he should earn; that he would never exercise any violence upon her; that he would not take her away from home; that it should not be within his power to marry or make any nika without her permission; that he would do nothing without her permission, and, if he did, she should be at liberty to divorce him, and realize from him the amount of dinmohur forthwith, and the nika would then be null and void. The plaintiff sued her husband upon this document, which was registered, to recover from him all his earnings amounting to Rs. 565, after deducting Rs. 54, which she admitted having received from him. The lower Appellate Court held, reversing the decision of the Munsif, that the agreement had been made subsequently to the marriage, and was, though registered, void for want of consideration. Held on appeal, that the agreement being registered, came within s. 25 of the Contract Act, and was not void on the ground that there was no consideration. Although some parts of the agreement might be illegal as being contrary to public policy, and therefore void, yet those which were legal could be enforced. The Court treated the suit as one to enforce that part only of the contract which was legal, and considered the plaintiff entitled to recover a fair sum for her maintenance.

In this case the plaintiff alleged that her husband, the defendant, had bound himself by an ikarnama to pay over to her all the money that he might earn by serving; that, on the 18th of December 1871, he obtained a situation in the Madrissa at Calcutta on a salary of Rs. 40 a month; that after that he had been engaged in the Chinsurah College on a salary of Rs. 60 a month, and that he was still employed there; that during this time he had acquired a sum of Rs. 565-5-6-2-2, but had paid her Rs. 54 only: she therefore brought her suit to recover the balance after deducting Rs. 54 already received by her. The document upon which the suit was brought was as follows:—

"I, Fyez Buksh, son of Meah Nubi Buksh, now of the town of Chinsurah, having executed the kabinnama in the presence of witnesses, do hereby execute this ikrar to the effect that I shall never give you troubles in feeding and clothing you; that I shall make over to you and to nobody else besides you whatever money I shall draw from employment; that I shall never exercise any violence on you; that I shall never assault or abuse; that I shall not take you anywhere else away from your home; that it will not be within my power to marry or make any nika without your permission; that I shall

* Special Appeal, No. 1404 of 1874, against a decree of the Subordinate Judge of Zilla Hooghly, dated the 25th April 1874, reversing a decree of the Officiating Sadder Munsif of that district, dated the 31st December 1873.

1874 not prevent those men from visiting you who may bear any relationship to you, or come to you for conducting your law suits, but they only and nobody except themselves will have the liberty of seeing you; that I shall do nothing without your permission; that if I do anything without your permission, you will be at liberty to divorce me and realize from me the amount of dinmohur forthwith, and this nika will then be null and void. I execute this ikrar of my own free-will to give effect to the above conditions."

The document was registered.

The defence, among other things, was that the contract was illegal, inasmuch as the defendant had promised to give up to her everything he might earn; that this ikrarnama was executed on the same day as the kabinnama and dinmohur, and that it was given in consideration of a promise on the part of the plaintiff to make over to him all the property she possessed, but that she had not done so; that the plaintiff had herself broken the contract in various ways.

The Munsif held that the contract was made in consideration of marriage, and was therefore binding; but that the reasonable interpretation of it was that the husband was to make over to the wife all his savings after defraying his necessary expenses, and that the defendant had not proved the breach of the conditions by the plaintiff. Accordingly he decreed that plaintiff was entitled to have Rs. 10 per month out of the husband's income, and Rs. 204-5-6-2-2 for past arrears.

On appeal, the Subordinate Judge reversed the decision of the Munsif holding that the contract was not in consideration of the marriage, but was executed subsequently to the marriage, and as a post-nuptial contract it was void; nor would the registration make it valid and binding; that the conditions were unreasonable; and that the plaintiff had broken the contract herself by her conduct towards her husband.

Mr. E. T. Allen and Mr. Sandel for the appellant.—By Mahomedan law, a husband is bound to support his wife,—Baillie's Digest of Mahomedan Law, p. 437. Some of the conditions are irreconcilable with English notions of contract, but there is nothing against public policy or against the Mahomedan law of contracts.

Mr. J. S. Rochfort for the respondent.—The contract, which the Subordinate Judge finds was executed after marriage, is one that made a slave of the husband, and left him no option in domestic matters, but placed him completely at the mercy of the wife. The defendant is, no doubt, bound to provide for the plaintiff's maintenance, and he is ready to do so, but the suit is not for that, but to enforce the contract, some of the conditions of which are clearly against public policy. Such a contract cannot be enforced.

Mr. Sandel in reply.—The contract here, if liberally construed, means the

same thing as the promise made by a husband at every Christian marriage. The plaintiff is clearly entitled to maintenance. She is prepared to take any reasonable allowance.

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FYN BUKAR

Cur. adv. vult.

The judgment of the Court was delivered by

COUCH, C. J. (who, after stating the facts and reading the *ikrar*, continued) :—

A question was raised whether this agreement was executed before or after the marriage. It was contended that it was after the marriage, and therefore that there was no consideration for it. The Subordinate Judge, against whose decision the present appeal has been brought, says, that it is evident from the contract itself, and proved by the evidence of plaintiff's witnesses, that the marriage was not the consideration for it. But supposing it was made after the marriage (although the evidence seems to show that the execution of this instrument and the formal marriage was parts of one transaction, and therefore that the marriage cannot be considered as the consideration for it, it is admitted that it was registered; and then it comes within the provision of the contract Act, which makes it unnecessary that there should be a consideration. S. 25 of that Act says that an agreement made without consideration is void, unless it is expressed in writing and registered under the law for the time being in force and is made on account of natural love and affection between parties standing in a near relation to each other. This agreement comes within that provision, and when the Judge says that, according to the principles of law, post-nuptial contracts are a mere nullity at law, he seems not to be altogether correct.

The question then is whether this is a contract which can be enforced. S. 24 of the Contract Act says that "if any part of a single consideration for one or more objects, or any one or any part of any one of several considerations for a single object, is unlawful, the agreement is void." That does not apply here. There was nothing unlawful in the consideration for this agreement, whether it was the marriage or the natural love and affection between these parties arising from the relation which had been created by the marriage, supposing the agreement to have been made afterwards.

If any section of the Act is applicable to this case, it is the 57th, which says that, "where persons reciprocally promise, first to do certain things which are legal, and secondly, under specified circumstances, to do certain other things which are illegal, the first set of promises is a contract, but the second is a void agreement." It may be that some part of this agreement is void as being illegal, because it is contrary to public policy that the defendant should enter into such stipulations as I have read, namely that he would do nothing without the permission of the plaintiff, and that if he did so, she should be at liberty to divorce him and realize from him the amount of *dinmohur* forthwith. It may also be said that, it is contrary to public policy that the defendant should engage to pay over to the plaintiff the whole of the money which he might earn during the time the marriage continued.

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But I think the fair construction of this agreement is, not as the plaintiff says, that he is to pay to her every rupee that he earns, but that he is entitled to a reasonable deduction for expenses which he must necessarily incur. And when the case comes before us, this is what the plaintiff claims, and we have been told that the plaintiff is willing to take a fair sum for her maintenance and such as may be necessary for it. We think we should look at the suit as one to enforce the part of the agreement which is legal, and not to enforce anything which the Court would be obliged to hold to be void. Therefore, treating the suit as one brought only to enforce the legal part of the agreement, and not that part which is clearly void, I think the plaintiff is entitled to recover a fair sum for her maintenance. Whilst the case was being argued, we thought that the offer which was made to take at the rate of Rs. 10 a month was a fair one, and that the defendant should be made liable to pay that. Therefore the decree of the Subordinate Judge will be reversed, and the plaintiff will be declared to be entitled to a sum of money calculated at the rate of Rs. 10 a month from the time when the agreement was executed until the time of the institution of the suit, giving credit for the Rs. 54 which the plaintiff admits that she has received. And the plaintiff will have the costs of the suit including the costs in this Court in proportion to the sum which she is declared to be entitled to.

1875

July 19 & 20.

Before Mr. Justice Phear.

IN THE GOODS OF LECKIE (DECEASED).

Letters of Administration—Attorney of Executor in England—o/s Of entering Caveat.

L, a British subject, possessed of property both in India and England died in England, leaving a will, by which he appointed four persons to be his executors in England, and *W D* his executor in India, "the latter accounting to the former for his intromissions, upon which he will charge a commission of three per cent." Probate was granted to the four English executors, but *W D* renounced probate. On an application for letters of administration with the will annexed, to be granted to *D G L*, the attorney in India of the English executors, the Court, after directing a special citation to issue to the Administrator-General, held that the English executors were intended by the testator to have power of administering his assets in India as well as in England, and therefore *D G L*, as their attorney was entitled to letters of administration.

APPLICATION for letters of administration with the will annexed.

C. S. Leckie, a British subject, possessed of property both in India and in England, died in England, leaving a will dated 28th July 1864, containing the following clause appointing executors thereof:—"I hereby appoint and constitute my brothers William and Thomas, my cousin Robert Gibson of Liverpool, and my friend George Henderson of Mincing Lane; London, to be my executors in England, and Walter Duncan, of Messrs. Playfair, Duncan & Co., Calcutta, to be my executor in India, the latter accounting to the former for his intromissions, upon which he will charge a commission of three per cent."

Probate of the will was duly granted to the four executors of the property in England; but Walter Duncan, the Indian executor, renounced probate. The applicant for letters of administration was D. G. Landale, the constituted attorney of the four persons named as executors in England. On the application by petition, setting forth the above facts, being made to the Court, the Judge (Phear, J.) directed a special citation to issue to the Administrator-General, who entered a caveat, and the matter now came on before the same Judge.

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Mr. Branson, in support of the application, submitted that the applicant was a person who, according to the practice of the Court, was entitled to letters of administration, and referred to s. 212 of the Succession Act and the cases of *In the Goods of Duncan* (1) and *In the Goods of Nesbit* (2).

Mr. W. Jackson (with him The Advocate-General, offg., Mr. Paul,) for the Administrator-General.—The Succession Act and s. 15 of Act II of 1874 show that the Administrator-General is to be preferred as grantee to any one except the next of kin: the only exception is when an executor, duly appointed for property in India, appoints an attorney. The person appointing the attorney must be one who, if he were here, would have a right as executor: the appointee of no other person has any right. Here different persons were appointed for the assets in England and in India, and the Indian executor has renounced; it is submitted that the person appointed by the executors in England has no right to letters of administration in preference to the Administrator-General. In England, by 55 Geo. III, c. 84, s. 2, the only person to whom the Ecclesiastical Registrar, in the absence of next of kin, had not a preferential right to letters of administration, was the lawfully appointed attorney of the executor. The Legislature have always allowed the testator to appoint whom he likes, but where he has failed to do so, the Administrator-General is to be preferred. In this case the executor appointed in India having renounced, the estate here is in the same position as if the testator had failed to appoint any executor here.

Mr. Branson in reply.—If the object be to place the estate in charge of the persons appointed by the testator, the letters of administration ought to be granted to the four English executors, or to their attorneys. They are the persons who are eventually to have charge of and deal with the whole assets of the estate. The Administrator-General, if letters were granted to him, could not administer the estate: he would be merely in the position of a person collecting assets and accounting to the executors in England. The learned Counsel referred to the case of *In the Goods of Wallich* (3) in which a testator had appointed executors in England and India, and it was held that those appointed in India were not entitled to probate in England. [PHEAR, J.—Is not that case rather against you?] No, the reason for so deciding was that

(1) 1 B. L. R., O. C., 3.

(2) 4 B. L. R., App., 49.

(3) 33 L. J., P. & M., 87;

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OF LAKSHI.

the testator clearly intended the Indian executors only to act in India: in the present case it is submitted his intention was that the English executors should have administration of his assets in India as well as England; see also *Velho v. Leite* (1.).

Cur. adv. vult.

PEAR, J.—On consideration of the will in this case, I think that the four gentlemen named as executors in England were intended by the testator to have the power of administering his assets everywhere,—that is to say, in India as well as in England,—and were not merely executors of the will for England. Mr. Duncan was named as executor in India, but with a qualification attached which seems to me to show that he was intended to be only the agent of the executors in England, and not to be executor of the will in India; in other words, I am of opinion that, if the gentlemen who have given the present applicant a power of attorney had been in India they would have had a right to probate of the will. That being so, it would be in accordance with the practice of the Court that letters of administration with the will annexed should be granted to their attorney. The application will therefore be granted. As to costs I think the Administrator-General was right to enter a caveat and appear on being cited, and therefore I think it would be right for the executors to pay his costs out of the estate. I do not know however if I have the power to make such an order.

Application granted.

Attorneys for the petitioner: Messrs. Orr and Harris.

Attorneys for the Administrator-General: Messrs. Chountrell, Knowles, and Roberts.

1875
July 8.

*Before Sir R. Gorth, Kt. Chief Justice and Mr. Justice Macpherson,
In re GHASSERAM (AN INSOLVENT).*

*Appeal—Insolvent Act (11 & 12 Vict., c. 21), s. 73—Security for Costs—
Personal Appearance of Insolvent.*

On an application for deposit of security for costs in an appeal by an insolvent under s. 73 of the Insolvent Act, in a case where the insolvent had been sentenced to imprisonment under s. 50 of the Act, and it was shown that he had absconded, the Court declined, to make any order for security for costs, but refused to hear the appeal, unless the insolvent was present.

APPLICATION for deposit of security for the payment of the costs of appeal. At the hearing of the insolvent's petition on 14th May 1875, the Commissioner of the Court (Pontifex, J.) considered that the insolvent had been guilty of fraudulent conduct in the matter of his insolvency, by keeping

false books, withholding entries, and concealing part of his property; and sentenced him under s. 50 of the Insolvent Act to imprisonment for three months: and adjourned the further hearing of the petition for two years. It was further ordered that all costs of the opposing creditors and the Official Assignee, should be paid out of the estate, and that the insolvent should personally attend on 15th May 1877, to be examined on the hearing of his petition. While the order was being made, the insolvent absconded, and had not been arrested. He, however, filed an appeal from the above order under s. 73 of the Insolvent Act.

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Mr. Jackson, for an opposing creditor, now applied that security for the costs of the appeal should be deposited, or that the appeal should be struck off; and contended that under the circumstances the appellant was not in a position to file an appeal. He had been actually committed to prison and was defying the Court; he could not claim the indulgence of an appeal. [GARTH, C. J.—Is it not a right given him by s. 73?] It is submitted he is in contempt. He is bound moreover to be present in Court. If the decree of the Court below had been one ordering his discharge, his presence would have been necessary as he would have had to swear to the truth of his schedule; and if that order had been confirmed by this Court, he would have had to be present here.

Mr. Lowe, for the insolvent, contended that the insolvent had an absolute right to appeal by s. 73 without any restrictions such as were imposed on appellants by Act VIII of 1859. The Court had no power in an appeal under that section to make an order for deposit of security for costs—*In re Ramsebak Misser* (1). [GARTH, C. J.—Assuming that to be so, we can say we will not hear the appeal unless he is present. MACPHERSON, J.—It has been the invariable practice for the insolvent to be present at the hearing of his petition.] It is submitted the Court would give him protection from the order which has been made against him, while his appeal is being prosecuted, so that he may have an opportunity of prosecuting it free from arrest.

GARTH, C. J.—We think it is quite as necessary for the purpose of our dealing with the case on appeal that the insolvent should be present here, as it was that he should be present in the Court below. For the purpose of doing entire justice in the appeal, we think the insolvent should be present, and we merely intimate that we will not hear his appeal, unless the insolvent is present in Court. We impose no conditions whatever upon him: we merely say we consider he should be present in Court, and that we will not hear his appeal unless he is.

Attorney for the appellant: Mr. Pittar.

Attorney for the opposing creditor: Mr. Gregory.

Before Sir R. Garth, Kt., Chief Justice and Mr Justice Macpherson.

1875
July 2.

GOURCHURN SOOR (PLAINTIFF) v. PEARY LALL PAUL (DEFENDANT).

*Second Summons—Act VIII of 1859, s. 112—Rule 12 of High Court Rules,
1st May 1875—Laches.*

A Judge has, under Rule 12 of the Rules of 1st May 1875, discretion as to granting a second summons, and is bound to enquire into the circumstances under which it is applied for; and when there has been great and unexplained laches, he should refuse it. Unless such discretion is clearly shown to have been improperly exercised, the Court will not interfere on appeal; but under the circumstances of this case the Court on appeal, finding there was no definite rule of practice as to the time within which a second summons might be applied for, allowed a second summons to issue.

APPEAL from a decision of Phear, J., dated 22nd April 1875.

The plaint in this suit was filed on 22nd July 1874; the summons was served on the defendant on 3rd August, and returned on 6th August to the Sheriff's Office. No further proceedings were taken until 30th March 1875, when it was discovered that the summons had not been properly served. An application for a second summons was thereupon made by petition, in accordance with Rule 12 of the Rules of the High Court of 1st May 1875, to the Judge (Phear, J.) in Chambers, who refused the application with the following remarks:—

PREAR, J.—If I am bound to grant a fresh summons in this case, merely because, if I do not, the petitioner will be unable to maintain his suit, there is an end of all discretion on the part of the Court in the matter. I think, however, that I have a discretion, which it is my duty to exercise. And upon looking at the petition, I find disclosed on the face of it the greatest carelessness and laches. There is no affidavit of facts made by any one who could speak to them. The only material facts which the petitioner condescends to refer to are spoken to merely on information and belief. The writ of summons was issued nine months ago, and the petitioner might have learned soon afterwards from the return or by communication with his own servant, Nobodeep Chunder Paul, what had been done in the way of effecting service. There is not the slightest reason given why he did not, or why he lay by for nine months without making any inquiry; and Nobodeep makes no statement of any kind. I think it important that this application is, in effect, an application to institute a suit which at this time is barred by the Act of Limitation, and that this fact makes it the more incumbent upon me to scrutinize carefully, and to ascertain if I can the true causes of the petitioner's apparent negligence and carelessness before I direct a fresh summons to issue. On the materials before me, I refuse to grant the application.

From this decision the plaintiff appealed.

Mr. *Lowe* and Mr. *Macrae* for the appellant contended that the Court had discretion as to granting a second summons; it was a power given him which he was bound to exercise. As to the meaning of the word 'may' in an Act they cited *Macdougall v. Paterson* (1) and *Anand Ohandra Bose v. Panch Lall Surma* (2); as to the grant of a second summons after so long a time had elapsed, *Eshanchunder Bose v. Prannath Nag* (3); and as to laches *Juggenath Saho v. Syud Shah Mahomed Hossein* (4). Act VIII of 1859, ss. 109 and 112, were also referred to.

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No one appeared for the respondent.

See also
G. B. L. R. 530

The judgment of the Court was delivered by

GARTH, C.J.—The Court has had some little difficulty in arriving at a conclusion in this matter. We feel that it is of the utmost consequence to urge upon suitors the necessity of prosecuting their proceedings with due diligence and without delay. There is nothing more reprehensible than the practice, which we fear is only too common, of commencing a suit and then holding the proceedings *in terrorem* over the defendants for weeks and months without taking any active steps to bring the suit to a hearing. We also feel, in cases of this kind, in which the Judge at Chambers is especially called upon to exercise his discretion that unless that discretion is clearly shown to have been exercised improperly, it ought not, as a rule, to be interfered with by this Court.

Now, in this case, the plaint was filed on the 22nd of July 1874; the summons was served on the 3rd of August, returned on the 6th of August to the Sheriff's Office, and allowed to lie there from the 6th of August to the 30th of March 1875, before anything further was done. It was then discovered that the summons had been improperly served, and improperly served under circumstances which ought undoubtedly, if the plaintiff's attorney had done his duty, to have come to his knowledge months before. However, as soon as the error in the service was discovered, an application for a second summons was made to the Judge at Chambers. He inquired very properly whether there was any excuse for the delay and whether any explanation could be offered of the long time which had been allowed to elapse before the second summons was applied for. He found that there was really no excuse, that there had been great laches on the part of the plaintiffs, and therefore we cannot say that in refusing the application he exercised his discretion improperly. We have however made enquires as to whether there is any definite rule of practice with regard to the time within which a second summons may be

(1) 11. C. B., 755.

(3) 14 B. L. R., 143.

(2) 5 B. L. R., 691, at p. 699.

(4) 14 B. L. R., 386; S. C., L. R., 2; I. A., 48

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applied for; and as we find that no definite rule has prevailed, and as, under the circumstances of this case, the consequences to the plaintiff would be very serious if he were precluded from taking any further proceedings in this suit, we have determined to deal more leniently with the matter than we otherwise should. At the same time we desire that the decision which we have arrived at should not be misinterpreted.

The rule now applicable to such a case is, Rule 12 of the 1st of May 1875 which states that "a fresh summons to appear and answer shall not be issued, without an order to be obtained by petition at Chambers."

This rule, though made on the 1st of May 1875, is merely declaratory of what had been the previous practice; and we cannot entertain a doubt that a Judge at Chambers, under this rule, is bound to exercise a discretion with regard to the granting of a second summons. He is bound to enquire, into the circumstances under which it is applied for, and if he finds that a plaintiff has placed himself in a difficulty by his own laches, he is quite right in saying that the Court will not help him out of that difficulty. Having regard, however, as I have before explained, to the peculiar circumstances of this case, and to the fact of there being no decided authority, showing within what time the second summons ought to be applied for, and giving moreover the plaintiff's attorney credit for no intentional default, we are disposed to take a lenient course, and to allow the plaintiffs to issue a second summons on the terms that they pay the costs of the whole of the proceedings from the time the plaint was filed, including the costs of this appeal; and also (as is suggested by my learned colleague) upon the further terms that they now proceed vigorously to prosecute the suit.

A fresh summons will issue; and whatever may be the result of the suit the plaintiffs must bear all the costs which have been incurred subsequent to the filing of the plaint including the cost of this appeal.

Attorneys for the appellant: Messrs *Dignam* and *Robinson*.

Before Mr. Justice Phear.

1875
July 20th, 26th
&
Aug. 2nd.

IN THE MATTER OF J. LOUIS, AND IN THE MATTER OF BENG. ACT VI OF 1866.

Act X of 1875, s. 147—Transfer of Case to High Court—Costs—Police
Magistrates—Notes of Evidence.

In a case transferred to the High Court under s. 147, Act X of 1875, the Court has no power to give costs.

Semle.—The case may be transferred after final determination by the Magistrate.

Notes of the proceedings before them should be taken in all cases by the Judicial Officers of all Criminal Courts subject to the Act.

CASE transferred to the High Court in its Original Criminal Jurisdiction under Act X of 1875, s. 147, from the Court of the Magistrate for the Southern

Division of the town of Calcutta. In this case a summons was issued to Mr. Louis to appear before the Magistrate to answer a charge of neglecting to give information to the Registrar of the district of the birth of a child. The hearing before the Magistrate resulted in Mr. Louis being fined Rs. 20. He thereupon applied to the High Court to have the case removed, alleging in the affidavit in support of his application that he had been prejudiced in making his defence by certain irregularities which he alleged had been committed in the course of the proceedings against him. The case was ordered to be brought up to the High Court, and on 26th July it came on for hearing before Phear, J.

1875

IN THE
MATTER OF
LOUIS.

Mr. Lowe on behalf of the prosecution.

Mr. Wood for Mr. Louis.

For the prosecution an objection was raised that s. 147, Act X of 1875, only applied to cases in course of being heard by the Magistrate, and not to case finally decided by him in which sentence had been given, but the objection was overruled. The case was adjourned for the purpose of having the notes of the evidence before the Magistrate sent up, but after adjournment it appeared that no notes of the evidence were taken before the Magistrate, and the conviction was ordered to be quashed, and the fine refunded. The Court remarked that it was incumbent on the Police Magistrates, and all other Criminal Courts from which cases might be transferred under Act X of 1875 to take notes of the evidence, so that, in event of the case being transferred, the Court might have the substance of the proceedings before the Magistrate.

An application by Mr. Wood for costs was refused, the Court being of opinion that it had no power under the Act to give costs.

Before Mr. Justice Phear.

IN THE MATTER OF J. N. MACKERTICH.

Attorney and Client—Lien for Costs—Title-deeds delivered for Specific Purpose—Right to Re-delivery.

1875
Sept. 13.

D, an attorney, who had a lien against *C* for costs on the title-deeds of certain property belonging to *C*, for whom he had been acting in negotiations for the sale of the property, delivered the deeds at the request of *C* to *M*, who was acting as attorney for *J*, an intending purchaser. *M*, on obtaining the deeds, signed a receipt for them, by which he undertook to "return them on demand without claiming any lien for costs or otherwise." *D* subsequently ceased to act for *C* in the matter of the sale of the property, of which *J* became the purchaser. The title-deeds remained with *M*. *Held* that *D* was entitled to have re-delivery of the deed to him from *M*, even independently of the express contract to return them. He did not give up possession of them to *C* by delivering them to *M*, though that was done at *C*'s request.

1875

IN THE
MATTER OF
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KERTICH.

THE affidavit of Mr. Dignam, one of the attorneys of the Court, stated that he was, from October 1865 to February 1870, a member of the firm of Carruthers, Pittar, and Dignam, from February 1870 to October 1872, a member of the firm of Carruthers and Dignam, and from February 1872 to June 1873, in business by himself, and from then to the present time a member of the firm of Dignam and Robinson; that in 1865 he was appointed, together with one G. H. Cable, constituted attorney for one F. P. Collins in England, the creditor's assignee of J. S. Collins, formerly of Calcutta, merchant, who had been adjudged bankrupt on his own petition on 18th May 1865 in the English Court under the Act of 1861; that his then firm of Carruthers, Pittar and Dignam, acted as the attorneys in Calcutta of F. P. Collins, as such creditors's assignee, under instructions from Dignam himself and Cable, and certain proceedings were instituted in the High Court and other work and labour done and performed by that firm for F. P. Collins under such instructions; that the bankruptcy of J. S. Collins was annulled on 21st May 1867, the debts proved having been paid in full with interest and costs, and due notice thereof was published in the *London Gazette* of 24th May 1867; that in the course of the employment of Carruthers Pittar, and Dignam in such business for F. P. Collins certain deeds and muniments of title relating to property in Howrah belonging to the estate of J. S. Collins, came into the hands of the firm of Carruthers, Pittar, and Dignam. On the annulment of the said bankruptcy, all the papers relating to the estate of J. S. Collins, except the said deeds and muniments of title, were given up by the firm to Mr. Fenn, then an attorney of this Court, who was the duly constituted attorney of J. S. Collins, and was authorized to receive the same; that the said deeds and muniments of title were not given up with the other papers, in consequence of a letter, and a copy of an agreement received from Messrs. Barrow, Sen and Watson, attorneys of the Court, on 30th July 1867; that the agreement was one made between J. S. Collins and one J. M. Grob, whereby after reciting that Collins was largely indebted to Grob, and that a certain sum had been realized to pay the creditors of J. S. Collins; which would be sufficient to pay all except Grob's claim, arrangements were made for payment of that claim, and it was agreed that the title-deeds of the property at Howrah should be held by Cable and Dignam, both before and after the annulling of the bankruptcy of J. S. Collins, in trust for Grob, and as security for the payment to him of the debt due to him, subject to the right and interest of F. P. Collins, as such assignee therein; to this agreement, J. S. Collins was to get the assent in writing of F. P. Collins, as such assignee, and Grob agreed thereupon to consent to the annulment of the bankruptcy; that in 1869 Fenn died, and from that date to the present Dignam had acted as attorney and agent for J. S. Collins at his request in the management of the Howrah property and other property belonging to him; and had done business for him as an attorney, and certain costs had become due to his firm of Carruthers and Dignam, to himself when practising alone, and to his present firm of Dignam and Robinson, in respect of

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such business, and such costs were still unpaid; that in May 1875 negotiations were pending between J. S. Collins and one Juggernath Rampertab for the purchase by the latter of the property at Howrah, in which matter Dignam was instructed by Collins to act for him as vendor's attorney, and Mr. Mackertich acted as attorney for the intending purchaser; that his firm prepared a draft contract for the sale of the property, and on 21st June 1875 sent it to Mackertich for his client's approval, but it was returned unapproved by Mackertich with a request that the title-deed might be sent; that on 23rd June 1875 Dignam wrote repeating an offer previously made to show the title-deeds, but objecting to part with them; that J. S. Collins bearing that the purchaser refused to sign the draft contract directed Dignam's firm to send the title-deeds and take a proper receipt for them; that Dignam thereupon wrote to Mackertich, asking if he were willing to give the usual accountable receipt "undertaking to return the deeds upon demand without claiming any lien thereon for costs or otherwise," and saying they would, in case he agreed to do this, send the deed; Mackertich replied "Please send the deeds on my accountable receipt," and the deeds were thereupon sent with a receipt as above; which was returned signed by Mackertich; that subsequently Mackertich informed Dignam that Collins had requested him not to communicate farther with Dignam in the matter of the purchase, but to send the draft conveyance direct to Collins for approval; that Dignam then reminded him of his receipt, warned him not to part with the deeds, and then told him, and subsequently, on demanding the deeds by letter, repeated the statement, that he had a lien on them for costs from Collins. To a subsequent demand for the immediate delivery of the deeds Mackertich replied that Collins informed him that Dignam had no lien on them, as he held funds belonging to Collins sufficient to cover any sum due for costs, and that Collins himself had no lien on the deeds; that the balance in his hands belonging to Collins, was only Rs. 92 odd, while a sum for costs was due to his various firms, and to himself when acting alone, amounting to more than Rs. 1,000: that he claimed a general lien on the deeds detained in respect of the whole of the costs, and a specific lien in respect of so much of the costs as related to the Howrah property, and also claimed to be indemnified by Collins in respect of the claim set up by Barrow, Sen and Watson, before giving up the deeds to Collins, or parting with them.

On this affidavit a rule was granted by Phear, J., calling on Mackertich to show cause why he should not deliver up the deeds and pay the costs of application.

Mr. Branson showed cause.

Mr. Macrae in support of the rule.

The following cases were referred to:—*In re Aitkin* (1); *In re*,

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Faithorne (1); *In re Gee (2)*; *Ex parte Hughes (3)*; *In re Faithfull (4)*.

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PHEAR, J.—There can I think be no doubt that Mr. Mackertich is bound to give up these documents to Mr. Dignam. He received them on a contract of a very specific character by which he bound himself to return them. He now says he is unable to carry out this contract because another person has a superior right to this document, i. e., superior to that of Mr. Dignam. He is setting up the right of another person—the *ius tertii* which is not altogether unlike the case of a carrier who receives goods to deliver to A, but before he does deliver them has notice of a claim of a third person B. He can only decline to carry out his first contract by establishing most clearly that B has a paramount right.

On Mr. Dignam's affidavit which is perfectly unimpeached, it appears that Mr. Dignam had, when he delivered the documents to Mr. Mackertich, a lien on them as against the owner of the property to which they relate. He had a right as against the owner of the property to keep possession of the documents. By allowing Mr. Mackertich to have them for a special purpose on behalf of a stranger, he did not give up possession of them to the owner, even though this was done at the owner's request. If after this he had lain by and permitted Mr. Mackertich to return them to the owner, probably he would have lost his lien. But he did not do so. Before they had left Mr. Mackertich's hands, he asserted his lien; and he had a right, I think, to require that they should be delivered back to him by Mr. Mackertich when the purpose for which the latter had received them from him was fulfilled, even independently of the express contract. And the purchaser's right to recover them from Mr. Dignam can rank no higher than that of the person from whom he bought the property, and he certainly as I think could not have prevented Mr. Dignam from receiving them back.

Had the purchaser as a matter of fact obtained the papers from Mr. Mackertich without any notice of Mr. Dignam's claim, then no doubt this Court would not have interfered to deprive him of them. But this is not the case. The person who received them from, and undertook to deliver them back to Mr. Dignam, has them still; and I think the order must be made absolute with costs.

Of course if any arrangement can be come to with Mr. Dignam by which Mr. Mackertich should discharge the lien, it will satisfy the object of the rule, but I can make no order as to that now.

(1) 3 Dow. & Low, 549; S. C., 10 Jur., 287.
(2) 2 Low. & Dow, 997; S. C. 10 Jur. 694.

(3) 5 B. & Ald., 482.

(4) L. R., 6 Eq., 325.

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ACT—1847—IX, ss. 6 & 9—*Right of Suit—Effect of an Order for additional Assessment.*] Certain land, which formed part of the plaintiff's zemindari, became, on its re-formation after submergence by a change in the course of the river Ganges, attached to the zemindari of J, and it being found so attached an additional jama was, after proceedings taken by the Revenue Authorities under Act IX of 1847, assessed against J in respect of it. In a suit in the Civil Court brought by the plaintiff against the Government J, and L, an ijaradar under J, to recover possession of the land — *held*, that the suit was not barred by the proceedings under Act XI of 1847. S. 6 of that Act makes the orders passed under its provisions final only against the zemindar, not against third persons. Nor would s. 9 bar the suit; the words of that section do not necessarily extend to forbidding a suit brought to recover property which the Government or its officers may be instrumental in keeping away from the rightful owner.

Held on the facts, that the Government had not, by the proceeding under Act IX of 1847, or otherwise, interfered with the plaintiff's rights so as to entitle him to relief against it in the present suit.

THE COLLECTOR OF MOORSHEDEABAD v. ROY DRUMPUT SINGH BAHADOOR 49

—1858—XL, s. 18—*Sale by guardian without Sanction of the Court.*] Where a guardian had mortgaged certain property of a minor without previously obtaining the sanction of the Court under s. 18 of Act XL of 1858, but it was found that the mortgage transaction was a proper one, and there had since been a decree in a suit in which the minor was properly represented under which the property had been sold, the irregularity as to the mortgage being made without the sanction of the Court was not allowed to prevail
ALFOOTONNISSA v. GOLUCK CHUNDER SEN 353 note.

—*Grounds for Recall of Certificate*] Where a guardian, appointed under Act XL of 1858, mortgaged certain immoveable property of the minor without obtaining the sanction of the Court under s. 18 of that Act, and it appeared he was related to and jointly interested with the minor in the management of the property, *held*, that it was not a sufficient cause to recall the certificate, unless it was made clear that in the mortgage transactions he had acted in bad faith, or had injured, or was likely, or had intended, to injure the interests of the minor.

IN THE MATTER OF THE PETITION OF BUSUNTO COOMAR GHOSH 351 note

—*Invalidity of Sale—Refund of Purchase-money.*] A sale of a minor's immoveable property by a guardian appointed under Act XL of 1858, and who was also the kurta of the joint family of

which the minor was a member, is invalid if made without the sanction required by s. 18 of that Act, even though the sale may have been for the benefit of the minor and made in good faith to pay off the debts of the ancestor.

Where, however, it was found that the purchaser had acted *bonâ fide*, and had paid a fair price for the property, he was held entitled to a refund of so much of the purchase-money as had been expended for the benefit of the minor.

SHUBRUT CHUNDER CHUTTORADHYA v. RAJKISSEN MOOKERJEE 350

ACT—1859—VIII—Beng. Act VIII of 1869—Jurisdiction—Rent.]

The defendant took from the plaintiff's ancestor a small portion of endowed land for a garden, and in consideration thereof paid him a certain fixed amount of grain for his maintenance and support, and subsequently that payment was commuted into a monthly allowance of Rs. 3-8, which was regularly paid still 1276, and then stopped. To a suit under Beng. Act VIII of 1869, to recover the amount, the defence was that a suit for a claim of such a nature could not be brought under that Act, but the objection was overruled, and the plaintiff held entitled to recover the amount sued for.

JALLALOODDEN v. J BURME 261 note

—, s. 2—Bengal Act VIII of 1869—Res Judicata—Suit for Rent—Jurisdiction of Civil Court.] The decision of the Civil Court in a suit for rent under Beng. Act VIII of 1869, is binding in a suit between the same parties for a declaration that the land, the rent of which was the subject of the former suit, is lakhiraj.

MOHIMA CHUNDER MOZOOMDAR v. ASRADHA DASSIA 251 note

—Res Judicata—Suit for Arrears of Rent—Act. X of 1859—Beng. Act VIII of 1869—Jurisdiction of Collector.] Held (JACKSON, J., dissenting), that a judgment by a Collector, in a suit under Act X of 1859, declaring the plaintiff entitled to assess rent upon land alleged by the defendant to be lakhiraj, is not conclusive in a subsequent suit between the same parties for arrears of rent under Beng. Act VIII of 1869.

Per JACKSON, J.—A decision in a previous and similar suit upon an issue raised substantially in the same manner by parties in a Revenue Court is binding upon them as evidence in a subsequent suit, which, but for the passing of Beng. Act VIII of 1869, would also have been brought in a Revenue Court.

HURRI SUNKUR MOOKERJEE v. MUKTARAM PATRO 238

—Suit for Rent—Jurisdiction of Collector.] The decision of the Collector in a suit for rent of certain land is conclusive, in a subsequent suit between the same parties in a Civil Court for a declaration that the land is liable to pay rent.

MOHESH CHUNDER BUNDOPADHYA v. JOYKISSEN MOOKERJEE 248 note

—] In a suit for rent under Act X of 1859, the Collector has no jurisdiction to decide a question of mukarrari title otherwise than so far as it may be incidental to the determination of the amount of rent, if any, due; and his decision on such a question is therefore not binding in a subsequent suit to establish the mukarrari right.

MERRA BABUR ALI v. SHAIKH DOWLUT ALI 242

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—, s. 11	367
See LIMITATION.	

—1861—XXIII, s. 11—*Execution—Mesne Profits and Interest—Estoppel.*] In construing the provisions of s. 11, Act XXIII of 1861, notwithstanding certain earlier decisions to a contrary effect, all the Indian High Courts have now recognized it to be settled law that, where the decree is silent touching interest, or mesne profits subsequent to the institution of the suit, the Court executing the decree cannot, under the section in question assess or give execution for such interest or mesne profits, but that the plaintiff is at liberty to assert his rights thereto by a separate suit.

The Judicial Committee of the privy Council, although of opinion that, if the matter had been *res integra*, the provisions of the section might have admitted of a different interpretation, being unwilling to run counter to a long and concurrent course of decisions of the Indian Courts in what is really a mere matter of procedure, accepted this construction of the law as binding.

The plaintiff obtained a decree for the possession of certain lands, with mesne profits up to the date of suit. No claim was made in the plaint for mesne profits accruing due after the date of suit, and the decree was silent in respect thereof. An appeal against the decree having been brought by the defendant, execution was from time to time stayed by the Court on the defendant giving security, to abide the event of the appeal, for the execution of the decree, and for payment of the mesne profits accruing, while the plaintiff remained out of possession. The decree having been confirmed on appeal, the plaintiff applied for execution in respect of the interim mesne profits :

Held in the Court below that, as these were not provided for by the decree, they could not, under s. 11, Act XXIII of 1861, be awarded in execution, but must be made the subject of a separate suit.

Held by the Judicial Committee that the proceedings whereby the defendant led the Court to stay execution and continue him in possession, laid him under an obligation to account in the suit, for the mesne profits which he engaged to pay; and that this obligation was capable of being enforced by proceedings in execution, notwithstanding the construction given by the Court to s. 11; since even if the defendant's liability to account were not to be considered "a question relating to the execution of the decree," within the meaning of the section, he was, in any case, precluded by the ordinary principle of estoppel from contending that the mesne profits in question were not payable under the decree.

Where a Court has a general jurisdiction over the subject-matter of a claim, parties may be held to an agreement that the questions between them should be heard and determined by proceedings contrary to the ordinary *curius curie*.

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—1875—X, s. 147— <i>Transfer of Case to High Court—Costs—Police Magistrates—Notes of Evidence.</i>]				
In a case transferred to the High Court under s. 147, Act X of 1875, the Court has no power to give costs.				

Semle.—The case may be transferred after final determination by the Magistrate.

Notes of the proceedings before them should be taken in all cases by the Judicial Officers of all Criminal Courts subject to the Act.

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ADMINISTRATION—Suit by Creditor—Misjoinder—Multifariousness—Practice] The principle of the rules that the creditor of a deceased person suing for administration is in the same situation with regard to all other persons as if he were bringing an action at law against the administrator, and that a debtor to the estate of a deceased person can only be made answerable as such debtor by the representative of the deceased's estate, is to be adhered to in this country, where there is a different procedure. Therefore, where to a suit brought against the Administrator-General as administrator of the estate of one W B by a creditor of the deceased, other persons who also had a claim against the estate were made defendants on the allegation that they had realised and were in possession of assets of the estate of the deceased,—*held* that, there being nothing to show that such persons were in the position of an executor or administrator *de son tort*, or that they had been partners with the deceased, or that they could not be sued, if necessary, by the legal representative himself, and there being no other circumstances which would make it equitable that they should be sued, jointly with the legal representative, they were wrongly made parties, and the suit ought to be dismissed as against them for misjoinder.

Even assuming the facts were such that the plaintiff was entitled to sue them as legal representative of the estate, he should not mix his own claim with that which the Administrator-General might have against them.

DHUNRAJ v. BROUGHTON. 296

LETTERS OF—Attorney of Executor in England—Costs of entering Caveat.] L, a British subject, possessed of property both in India and England, died in England, leaving a will by which he appointed four persons to be his executors in England, and W D his executor in India, "the latter accounting to the former for his intromissions, upon which he will charge a commission of three per cent." Probate was granted to the four English executors, but W D renounced probate. On an application for letters of administration with the will annexed, to be granted to D G L, the attorney in India of the English executors, the Court, after directing a special citation to issue to the administrator-General, held that the English executors were intended by the testator to have power of administering his assets in India as well as in England, and therefore D G L, as their attorney, was entitled to letters of administration.

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————— <i>Insolvent Act (11 & 12 Vict., c. 21), s. 73—Security for Costs—Personal Appearance of insolvent.]</i> On an application for deposit of security for costs in an appeal by an insolvent under s. 73 of the Insolvent Act, in a case where the insolvent had been sentenced to imprisonment under s. 50 of the Act, and it was shown that he had absconded, the Court declined to make any order for security for costs, but refused to hear the appeal, unless the insolvent was present.	
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ATTORNEY AND CLIENT—<i>Lien for Costs—Title-deeds delivered for specific Purpose—Right to Re-delivery.]</i> D, an attorney, who had a lien against C, for costs on the title-deeds of certain property belonging to C, for whom he had been acting in negotiations for the sale of the property, delivered the deeds at the request of C to M, who was acting as attorney for J, an intending purchaser. M, on obtaining the deeds, signed a receipt for them, by which he undertook to "return [them] on demand without claiming any lien for costs or otherwise." D subsequently ceased to act for C in the matter of the sale of the property, of which J became the purchaser. The title-deeds remained with M. Held, that D was entitled to have re-delivery of the deeds to him from M, even in dependency of the express contract to return them. He did not give up possession of them to C by delivering them to M, though that was done at C's request.	
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—, s. 102— <i>Co sharer—Suit for Rent—24 & 25 Vict., c. 104, s. 15—Superintendence of High Court.</i>] The plaintiff one of several co-sharers of a talook, sued to recover her share of rent making her-co-sharers, who resisted her claim, defendants. The first Court raised and tried questions of title between the plaintiff, her co-sharers, and the ryot, and decided in favor of the plaintiff. The lower Appellate Court, without expressing any opinion on the rights of the parties, dismissed the suit on the ground that it was not maintainable. On special appeal it was contended that no appeal would lie, as the amount of the claim was less than Rs. 100, and no question of title was determined by the judgment; but this objection was overruled, on the ground that the decree of the lower Appellate Court, dismissing the suit, had the effect of deciding the questions of title against the plaintiff. It was also held that even if this view were incorrect, it was a case in which the jurisdiction vested in the Court under s. 15 of 24 & 25 Vict., c. 104, ought to be exercised. On appeal under s. 15 of the Letters Patent, held that the judgment rather than the decree is to be looked at in applying s. 102, Beng. Act VIII of 1869. No appeal lay from the judgment of the lower Appellate Court, inasmuch as that judgment showed, not only that no question of title was determined, but that the Judge did not even consider it. Held also that the power conferred by the 15th section of 24 & 25 Vict., c. 104, ought not to be exercised in such a way as to do indirectly that which the law forbids to be done directly.	
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—1870—IV, s. 75— <i>Sale for Arrears of Rent—Power of Collector—Tenure created under Court of Wards—Previously existing Tenure.</i>] The provisions of s. 75 of Beng. Act IV of 1870 apply only to tenures created by the Collector during the time the estate has been in the hands of the Court of Wards, and not to tenures created previously. A Collector, therefore, has no power to sell for arrears of rent a tenure created before he took charge of the estate without previously obtaining a decree for such arrears in the regular way.	
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See DECLARATORY DECREE. See WAKH.

CONTRACT ACT (IX OF 1872), ss. 24, 25, & 57—*Post-nuptial Contracts—Contract partly legal and partly illegal—Mahomedan Law.*] The defendant, a Mahomedan husband, executed a kabin-nama in favor of his wife, by which he agreed, among other things, that he would maintain her and make over to her whatever money he should earn; that he would never exercise any violence upon her; that he would not take her away from home; that it should not be within his power to marry or make any nika without her permission; that he would do nothing without her permission, and, if he did, she should be at liberty to divorce him, and realize from him the amount of dinmohar forthwith, and the nika would then be null and void. The plaintiff sued her husband upon this document, which was registered, to recover from him all his earnings amounting to Rs. 565, after deducting Rs. 54, which she admitted having received from him. The lower Appellate Court held, reversing the decision of the Munsif, that the agreement had been made subsequently to the marriage, and was, though registered, void for want of consideration. *Held* on appeal, that the agreement, being registered, came within s. 25 of the Contract Act, and was not void on the ground that there was no consideration. Although some parts of the agreement might be illegal as being contrary to public policy, and therefore void, yet those which were legal could be enforced. The Court treated the suit as one to enforce that part only of the contract which was legal, and considered the plaintiff entitled to recover a fair sum of her maintenance.

POONOO BIBEE v. FYZE BUKSH App. 5
 ss. 73, 74, 84, & 107 . . . 276.

See CONTRACT, BREACH OF.

—, BREACH OF—*Damages—Contract Act (IX of 1872), ss. 73, 77, 84, & 107—Resale. Notice of—Rights of unpaid Vendors—Onus—Nominal Damages.*] The defendant purchased from the plaintiffs a cargo of Watson's Hartley steam coal at Rs. 21 per ton, to arrive by ship *Grecian*, but on its arrival the defendant, on being called upon to do so, refused to take delivery, on the ground that the usual certificate that the coal was what it was stated to be, did not accompany the cargo. [The plaintiffs thereupon gave notice to the defendant that, unless delivery were taken, the coal would be sold on his account and at his risk, and on the defendant repeating his refusal to take delivery, the plaintiffs caused the coal to be sold, and it was purchased in the name of M. & Co. for Rs. 13 per ton. In a suit, which was stated in the plaint to be for the loss sustained by the plaintiffs on the resale, the Court found that the plaintiffs themselves were the real purchasers, and that the sale had taken place without proper notice, and under the circumstances was invalid. *Held*, both in the lower Court and on appeal, that the plaintiffs had, by the way, in which they had dealt with the coal, rendered themselves accountable to the defendant in respect thereof, and that notwithstanding the defendant had committed a breach of the contract in refusing to take delivery of the coal, the plaintiffs were bound to give an account of the coal, and prove that they had sustained a loss on the resale, and on their omission to do so, they were not entitled to recover any damages.

Held, on appeal, *per* MARKBY, J., that the plaintiffs were not entitled to put aside the sale as invalid, and treat the case as one for damages for breach of contract. Under the circumstances they

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were not entitled to even nominal damages. The mere shipment on board the *Grecian* did not pass the property in the coal to the defendant under s. 77 of Act IX of 1872.

Per PONTIFEX, J.—Whether, by virtue of the contract and the subsequent appropriation and shipment, the property in the coal passed or did not pass to the defendant within the meaning of s. 84 or s. 83 of Act IX of 1872, even if the sale were invalid, the plaintiffs were not entitled, considering their conduct in dealing with the coal, and the concealment of their interest in the purchase, and in the absence of satisfactory evidence of what ultimately became of the coal, to recover any damages?

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COURT FEES ACT (VII of 1870), Sch. II, No. 17—Act VIII of 1859, s. 246—Stamp.] A suit brought under the provisions of s. 246 of Act VIII of 1859 to set aside an order allowing a claim to attached property and releasing the property from attachment is a suit to try the title and establish the right of the person who brings the suit; and such a suit must be valued according to the value of the property, and cannot be brought upon a stamp of Rs. 10, under No. 17 of Sched. II. of the Court Fees Act.				
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<i>Suit to set aside a Deed or Will—Declaratory Decree—Consequential Relief.] In a suit for confirmation of possession by declaration of proprietary right, and also to set aside a forged and invalid will, held that the plaintiff sought consequential relief over and above the declaratory decree prayed for, and therefore the petition of appeal ought to be engrossed on a stamp of proportionate value to the subject-matter of the suit.</i>				
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The words of s. 15, Act VIII of 1859, must be construed upon the principles and by the light of the decisions of the English Courts of Equity upon the 50th section of 15 & 16 Vict., c. 86, which is in similar terms.	
The effect of these decisions, taken in conjunction with the decisions of the Privy Council, in construing the provisions of the Indian Act, is that a declaratory decree is not to be made unless there is a right on the part of the plaintiff to consequential relief, which, although not asked for, might, if asked for, have been given or unless the declaration of right may be made the foundation of relief to be had in another Court.	
The plaintiff purporting to be the next heir, brought a suit against the life-tenant of a zemindari, and made another claimant to the succession to the zemindari a defendant in the suit. The plaintiff prayed for a decree declaratory of the plaintiff's right to succeed on the death of the zemindar, and made allegations of waste in, respect of which he asked relief. <i>Held</i> , that even if the plaintiff had proved the alleged act of waste, which he had not done, there was not a right to consequential relief which would entitle him to a declaratory decree.	
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ENHANCEMENT OF RENT— <i>Reg. VIII of 1793, s. 51—Act X of 1859, s. 15—Dependent Talook.</i> A dependent talook created before the Decennial Settlement is protected from enhancement by s. 51. <i>Reg. VIII of 1793</i> , except under the circumstances therein mentioned.	
In a suit by a zemindar for enhancement, brought after Act X of 1859 came into operation, against the holder at a fixed rent of a dependent talook, the latter is protected from enhancement by the provisions of s. 15 of that Act, notwithstanding decrees pronounced in previous litigation between the parties declaring the zemindar's right to enhance, and directing that the rent of the talook should be assessed at pergunna rates, if it appear that the rent never has been assessed at pergunna rates, and never has been enhanced, but has remained unchanged from the time of the Permanent Settlement.	
Such decrees place the zemindar in no better position than other landlords, who previously to the passing of Act X of 1859, had a good right to enhance, but whose right, not having been exercised from the time of the Permanent Settlement, has been taken away by the 15th section of that Act.	
HURRONATH ROY v. GOBIND CHUNDER DUTT.	
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<i>Form of Decree—Act X of 1859, ss. 13 & 17—Notice of Enhancement.</i> The defendant, as middleman, took a clearing lease of certain land, which it was agreed in the kabuliath he should hold during 1260 without any rent; "for 1261 at the rate of Rs. 1 per kanees; for 1262 at Rs. 2 per kanees; for 1263 at Rs. 3 per kanees; and in 1264 at the full customary rate of Rs. 5 per kanees." The tenure was admittedly a permanent one. In a suit for arrears of rent for 8272, after notice of enhancement under s. 13, Act X of 1859, <i>held</i> , that the intention was that after 1264 the rent should be fixed, and it was therefore not liable to enhancement.	
In such a suit, if the enhancement be refused, a decree should not be given for arrears of rent at the rate agreed in the kabuliath.	
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not entitle him to claim exemption from all debts contracted by the father subsequent to his birth. Such exemption can only be claimed when the debts are of an illegal nature, or have been contracted for immoral purposes.

An alienation made by the father by way of mortgage or sale for the discharge of a debt for which the property would be ultimately liable, falls within the meaning of the unavoidable transactions spoken of in paras. 28 and 29, s. 1, Ch. i of the Mitakshara.

MUDDUN GOPAL LALL v. MUSSAMUT GOWRUBUTTY.

GREDHARI LALL SAHOO v. MUSSAMUT GOWRUBUTTY.

POOSUN LALL SAHOO v. MUSSAMUT GOWRUBUTTY ... 264

HINDU WIDOW—*Sale for Arrears of Rent—Personal Decree against Widow—Rent accruing after Husband's Death—Beng. Act VIII of 1869—Estoppel—Remand.*] In execution of a decree in a suit under the provisions of Regulation VIII of 1831 against a Hindu widow for arrears of rent of a certain talook, the interest of the widow in another talook was sold in 1852 under Act IV of 1846; and in execution of another decree on a bond given by the widow for arrears of rent, a third talook was sold in 1865. Both decrees were for arrears of rent which had accrued due after the death of the husband; and the suits were brought against the widow alone, the reversioner not being made a party. In a suit by the purchaser of the talooks from the reversioner against the purchasers at the execution sales to recover possession of the talooks, held that the plaintiff was entitled to recover. The decrees for arrears of rent were a personal debt of the widow, and not a debt against the estate of the deceased husband. Such decrees can be enforced by the sale of her interest only, except where the proceeding is one which authorizes the sale of the tenure under Beng. Act VIII of 1869. Even assuming them to be a charge on the husband's estate, the onus was on the defendants to prove that such charge was created by legal necessity, which they had failed to do.

Held also that where parties allow a suit to be conducted in the lower Courts as if a certain fact was admitted, they cannot afterwards, on special appeal, question it, and recede from the tacit admission.

MOHIMA CHUNDER ROY CHOWDHRY v. RAM KISHORE ACHARYA CHOWDHRY ... 142

*Widow's Rights and Interests—Misjoinder—Objection * taken for first time on Special Appeal.*] Arrears of rent due to a zemindar by a Hindu widow in possession of her husband's property are not a personal debt of the widow; and on a sale of the property taking place in execution of a decree against the widow for such arrears, in a suit under Act X of 1859, the purchaser acquires the property absolutely, and not merely the rights of the widow:

TELUCK CHUNDER CHUCKERBUTTY v. MUDDUN MOHUN BRAHMIN JOOGEE ... 143 note

IDOL, PURCHASE IN NAME OF ... 176 note

See RELIGIOUS ENDOWMENT.

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<i>See</i> ACT VIII of 1859.	
<i>Letters Patent, 1865, cl. 12—Suit for Land—Trust Estate—Receiver—Account.</i>] The plaint in a suit brought by some of the persons appointed trustees under a deed of endowment of certain land against their co-trustees who were in possession, alleged that the defendant-trustees had ousted the plaintiffs and had committed breaches of trust, and prayed that the deed might be construed and given effect to, and for a declaration that the plaintiffs were entitled to be sebaits jointly with the defendants for the settlement of a scheme for the performance of the worship, for the appointment of a receiver, for an injunction to restrain the defendants from interfering with the property, and for an account. By the deed the land was given to idols named therein, and the plaintiffs and defendants were appointed sebaits and managers of the property, and were directed to accumulate for the benefit of the idols any surplus over and above the expenses of management, but were themselves to have no beneficial interest in the property. The land, the subject of the deed, was situated out of Calcutta, but all the parties to the suit resided within the local limits of the High Court's jurisdiction. <i>Held</i>, that the suit was not a suit for "land or other immovable property" within cl. 12 of the Letters Patent, and therefore the Court had jurisdiction to entertain it without leave to sue being obtained. The Court might, if necessary, appoint a receiver of such property and direct an account.	
JUGGODUMBA DOSSEN v. PUDDUMONNY DOSSEN	318
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<i>See</i> WAKE. <i>See</i> ACT VIII of 1859, s. 2.	
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See ATTORNEY AND CLIENT.

LIGHT AND AIR, OBSTRUCTION TO ACCESS OF—*Easement—Act IX of 1871, s. 27—Enjoyment “as of Right”—Unity of Possession—Extinction of Easements—The English Prescription Act (2 & 3 Will IV, c. 71), s. 3—Grant independent of User—Nuisance.* In a suit to restrain the defendant from obstructing the access of light and air through certain windows of the plaintiff's house, it appeared that both the tenements had formerly constituted the joint property of a Hindu family, and that in 1835 a partition took place among the various members composing it, by which the tenement in the occupation of the plaintiff became separated from that occupied by the defendant; that the latter property was, in 1860, purchased by the plaintiff jointly with one G, but under the purchase the plaintiff took sole possession thereof; that in 1867, however, he relinquished it in favor of G in pursuance of an award, wherein it was found the plaintiff had no right or title thereto; and that in 1870 it was purchased by the defendant, who in 1871 and 1872, erected the obstructions complained of by the plaintiff. *Held*, that though in the interval between 1860 and 1867, the plaintiff had not such an estate in the servient tenement, as to constitute unity of title in him to the two tenements, and thereby extinguish all easements between them, yet the unity of possession in the plaintiff during that period excluded the operation of s. 27 of Act IX of 1871, as the enjoyment during that time was not “of right.”

Sembla.—In order that the enjoyment should be “of right,” there must be an adverse exercise of it as against the servient holder.

Act IX of 1871, does not exclude other modes than therein provided of acquiring an easement by enjoyment.

In this case applying the law of prescription in force in Calcutta prior to 1871, which was the English law previous to the passing of 2 & 3 Will IV, c. 71, a grant might be implied independently of user: and under the circumstances of the case, the plaintiff was entitled to such right to easements of light and air as can be inferred from enjoyment *i. e.*, a right to restrain the defendant from committing any act whereby the access of light or air should be so diminished as with respect to air to prove a nuisance or injurious to health, and with respect to light to render the house unfit for comfortable habitation.

MODEROOCHUN DEY v. BISSHAUTE DEY 361

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See RELIGIOUS ENDOWMENT. See REGISTRATION. See

MAHOMEDAN LAW

—*Act XIV of 1859, cl. 1, ss. 1 & 14—Act X of 1869, s. 32—Beng. Act VIII of 1869, ss. 21 & 29—Suit for Arrears of Rent—Zemindar Talookdars—Joint Sharers.* The words of s. 29, Beng. Act VIII of 1869, are intended to apply specially, and exclusively of Act XIV of 1859, to the same class of cases as those to which s. 32, Act X of 1869, applied, though that class cannot now be defined, as it formerly could, by reference to the jurisdiction of the Court in which the cases fall to be entertained. The class is limited to suits for arrears of rent simply, as “arrears of rent” are defined in s. 21, Beng. Act VIII of 1869.

Where a part-proprietor of a certain talook, who was also a co-sharer in a fractional portion thereof, brought suits against his co-talookdars in the Revenue Court for arrears of rent without allowing any deduction on account of his share, which suits were dismissed for want of jurisdiction, and afterwards brought a suit for the rent for the same period in the Civil Court,—*held*, that the suit was not one for the recovery of arrears of rent within the meaning of s. 29, Beng. Act VIII of 1869, but was governed by the provisions of Act XIV of 1859. The suit was one for rent of land, and fell within the scope of cl. 8, s. 1 of that Act; and the plaintiff was, in computing the limitation, entitled under s. 14 to a deduction of the period during which he was prosecuting his suit in the Revenue Courts. *Held* also, that a zemindar, by becoming a co-sharer in the talook, does not lose his right to the joint responsibility of all the other co-sharers for the due payment of the rent; he only becomes bound to make an allowance for that portion which he as a co-sharer ought to pay.

GOBIND COOMAR CHOWDERY v. W. B. MANSON.

W. B. MANSON v. GOBIND COOMAR CHOWDERY ... 56
LIMITATION — *Adverse Possession* — *Hindu Law* — *Inheritance* — *Succession of Widows and daughters* — *Reversioners* — *Evidence* — *Admission on Pleadings*.] Where a Hindu widow, who takes by inheritance from her husband, is dispossessed, the period of limitation as against the reversionary heir claiming the succession after the widow's death is, in the absence of fraud, to be reckoned, not from the time of the widow's death, but from the time from which it would have run against the widow had she lived and sued to recover the inheritance.

In the English Common Law Courts, and, *a fortiori*, in the Courts of Law in India, where the pleadings are less technical, an admission of a fact on the pleadings by implication, is not an admission for any other purpose than that of the particular issue, and is not tantamount to proof of the fact.

An admission, or even a confession of judgment by one of several defendants in a suit, is no evidence against another defendant.

In a suit instituted before Act XIV of 1859 came into operation, the periods of successive minorities might be deducted in reckoning the term of limitation.

R., holding ancestral estates in Bengal, jointly with his brothers as an undivided Hindu family, died, leaving a widow, *S*, and three unmarried daughters, *B*, *S M*, and *N*. On her husband's death, *S* continued to reside with his brothers and was supported out of the income of the joint estate. During the lifetime of *S*, her daughters married, and *B* became a widow without having had a child. After *S*'s death, and during the lifetime of *S M*, *N* also became a childless widow. *S M* died after her mother, leaving a son, *E K*. *E K*, on attaining majority, sued to recover with mesne profits a 4-anna share in the ancestral estates to which he claimed to be entitled on his mother's death as heir of *R*, and from which he alleged that he had been dispossessed by the representatives of *B*'s brother's who he made defendants in the suit, joining *B* and *N* with them as co-defendants. Some time after the institution of the suit, a petition was filed, purporting to proceed from *B* and *N*, by which they admitted that the plaintiff was the heir of *R*, and that they had no defence to offer. *Held*, 1st.—That limitation could not be taken to have run against the plaintiff's claim during the lifetime of *S*, who, in the absence of proof that she had received only maintenance, as distinguished from participation in the profits

of the estate, must be presumed to have had possession of the share in the estate which she inherited as her husband's widow. 2nd.—That *B*, being a childless widow at the time of her mother's death, could take no interest in her father's estate. 3rd.—That, on their mother's death, *S M* and *N* as heirs of their father took a joint estate in his succession: and on *S M*'s death, the estate which had come to her and *N* jointly, survived to *N*, since the fact of the latter being at that time a childless widow did not destroy the right of survivorship which she had previously acquired by inheritance. 4th.—That *N* being the heir of *B*, *B K* had not, during her lifetime, any right to any part of the estate, and that his position was not altered by the petition, purporting to proceed from *B* and *N*, such petition not amounting to a conveyance or disclaimer of title in his favor. 5th.—That, if the petition could have been treated as a relinquishment on the part of *N* of her rights in the plaintiff's favor, it would have been necessary to enquire whether *N* was not herself barred by limitation at the time when she transferred her rights.

AMRITOLAL BOSH v. RAJOWNEERANT MITTER... 10

IMITATION—*Appeal*—*Act IX of 1871, s. 18*—In computing the period of ninety days under s. 13 of Act IX of 1871 for filing an appeal, the appellant is, as a matter of right, entitled to deduct the number of days required for taking a copy of the decree only. The word "decree" in that section does not include the "judgment."

Under the circumstances, however, the Court admitted the appeal although presented after time.

HOBIL PATTUCK v. BHOWANNEERAM ... 273 note

Act VIII of 1859, s. 333.] In computing the period of limitation prescribed for an appeal by s. 13 of Act IX of 1871 the time from which the period must be taken to run is the date of the decree appealed against: and the days which under that section may be excluded are only the days requisite for obtaining a copy of the decree.

But if in any case it is impossible for the appellant to obtain a copy of the decree, or to obtain a copy of the judgment, in time, the Court, if satisfied that the appellant is not to blame, may consider that there is sufficient cause within the meaning of s. 5, cl. b of Act IX of 1871, and may, on application, admit the appeal after the period of limitation prescribed by the Act.

JAGANNATH SINGH v. SHEWRATAN SINGH, ... 272

Minor, Purchaser from—*Representative*—*Act IX of 1871, s. 7*—*Act XIV of 1859, s. 11*] Whatever may have been the effect of s. 11 of Act XIV of 1859, as to extending the privilege given to a minor to his representative, s. 7, the corresponding section of Act IX of 1871, limits the privileges to the minor himself and his representative after his death; and therefore a purchaser from a minor cannot claim the benefit of that section.

MAHOMED ARSAD CHOWDHRY v. YAKOUB ALLY ... 357

Suit for Arrears of Rent—*Act X of 1859, s. 32*—*Act XIV of 1859.*] The limitation in a suit for arrears of rent brought in the Collector's Court, under Act X of 1859, is that provided by s. 32 of that Act, and not that provided by Act XIV of 1859.

UNNODA PERSAUD MOOKERJEE v. KRISTO COSMAN MONTRO 60 note

ACT, 1859. See Act XIV of 1859.

LIMITATION ACT, 1871, SCHED. II, No. 129, & s. 7

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See SUIT TO SET ASIDE ADOPTION.

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See WAKF. See CONTRACT ACT, 1872, ss. 24, 25. & 57.

Exigible Dower—Demand—Application to sue in Formâ Pauperis—Cause of Action—Limitation—Act VIII of 1859, ss. 299, 308.] The prompt or exigible dower of the Mahomedan law may be regarded as a debt always due and demandable during the subsistence of the marriage, and certainly payable on demand. On a clear and unambiguous demand by the wife for payment, and refusal by the husband to pay such dower, a cause of action accrues, against which limitation begins to run.

An application under s. 299, Act VIII of 1859, by a Mahomedan woman for leave to sue her husband for exigible dower, in *forma pauperis*, may be taken to express her intention of bringing an action for dower, only if she obtains leave to do so as a pauper. Until she has the Court's permission to sue, her application does not amount to a demand by way of action.

A counter-petition by the husband objecting to the pauper suit being allowed, and denying his liability to pay the dower, does not alter the character of the proceedings, since no opposition on his part can constitute a cause of action, unless there has been a previous demand by the wife; the option being with her to demand the dower or not, and to elect her time for demanding it.

RANEE KHAJOOROONNISSA v. MIRZA SAIFOOLLA KHAN:

MIRZA SAIFOOLLA KHAN v. RANEE KHAJOOROONNISSA ... 306

Gifts—Musha or Confusion—Minority—Reg. XXVI of 1893, s. 2.] Where there is on the part of a father or other guardian of a minor a real and *bona fide* intention to make a gift to the minor, the Mahomedan law will be satisfied without actual change of possession, and will presume the subsequent holding of the property by the father or guardian to be on behalf of the minor.

Where the subjects of a gift are definite shares in certain zemindaris, the nature of the right in which is defined and regulated by the public Acts of the British Government, so that they form for revenue purpose distinct estates, each having a separate number in the Collector's books, and each liable to the Government only for its own assessed revenue, the proprietor collecting a definite share of the rents from the ryots, and having a right to this definite share and no more, the rule of the Mahomedan law as to *musha*, which makes the gift of undivided property invalid, does not apply.

Quære.—Whether the law relating to *musha* applies to those cases in which the owner gives all his own interest in undivided property?

A plaintiff sued to set aside certain documents which he alleged to have been forged by the defendant. At the trial of the case in the Court of first instance the only issue directed these documents was:—"Are the three written agreements said to have been given by the plaintiff to the defendants genuine and valid deeds?" It was not contended by the plaintiff in that Court that the agreements had been obtained from him while he was a minor by undue influence, nor was that objection taken in the grounds of appeal against the judgment of the Court. *Held*, that it was too late to take the objection for the first time in the Court of Appeal.

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<i>Sembla.</i> —In respect of a transaction in which a Mahomedan, the proprietor of an estate paying revenue to Government, disposes of that estate, the period of minority is that of eighteen years, as fixed by s. 2, Regulation XXVI of 1793.	
AMEROONNISSA KHATOON v. ABADOONNISSA KHATOON ...	67
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<i>See</i> HINDU WIDOW. <i>See</i> SLANDER, ACTION FOR. <i>See</i> ADMINISTRATION.	
MITAKSHARA	190, 264, 405
<i>See</i> HINDU LAW.	
MORTGAGE— <i>Notice of Foreclosure—Purchaser from Mortgagees.</i> Property in the mofussil which had been mortgaged in 1862 to O by a deed in the English form containing the usual power of sale on default of payment and again in 1864 to T by deed of conditional sale, was sold by O under the power of sale and purchased by N. Previously to the sale T had foreclosed. In a suit for possession of the property brought by the widow of T against N and the mortgagor, it appeared that no notice of foreclosure had been served on N. <i>Held</i> , that N was entitled to such notice by the fact of his purchase whether he had obtained possession or not and that no notice having been served upon him, the suit was not maintainable against him	
BHANOOMUTTY CHOWDHRAIN v. PREMCHAND NEOGEE ...	28
— <i>Reg. XVIII of 1806, s. 8—</i> <i>Assignee of Mortgagor.</i> The assignee of a mortgagor, though purchaser of only a portion of the mortgaged property, is his "legal representative," within the meaning of s. 8, Regulation XVII of 1806, and as such entitled to notice of foreclosure.	
SHEO GOLAM SINGH v. RAMBOOP SINGH	34 note
— <i>Redemption of a Portion of mortgaged Property—</i> <i>Purchase of Portion of Equity of Redemption by Mortgagees.</i> E mortgaged to N certain property, of which N caused a moiety to be sold in execution of a money-decree against E, and himself became the purchaser. The other moiety was sold subject to N's mortgage in satisfaction of another decree, and purchased by L. N, in exercise of his rights as mortgagor, attached and proceeded to sell the share of L in the portion purchased by him, and L thereupon, with a view to stay the sale, deposited an amount proportionate to the share held by him. The sale, however, was allowed to proceed. <i>Held</i> in a suit brought by L against N to set aside the sale, he was entitled to a decree.	
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PARTNERSHIP— <i>Liability of Partner for Purchases made by Co-partner out of the Scope of Partnership Business—Application of Proceeds of Sale to pay Partnership Debts.</i> <i>C</i> , the managing member in Calcutta of a firm of which <i>B</i> the other partner was absent in England, made, unknown to <i>B</i> and without authority from him, various purchases from the plaintiff of articles not within the scope of the partnership business. The purchase were made as for the firm, and were delivered on the partnership premises by the plaintiff. Subsequently the goods were taken to <i>C</i> 's house, and, together with certain private property belonging to <i>C</i> , were sold by auction, and the whole proceeds of the sale were paid by <i>C</i> to a Bank in Calcutta, to the partnership account with that Bank, and were eventually remitted to <i>B</i> in England as from the partnership funds, and applied in payment of certain bills of the firm then due. <i>B</i> , on coming to Calcutta, took over the management of the business from <i>C</i> . In a suit brought against <i>B</i> and <i>C</i> for the price of the goods purchase from the plaintiff, <i>held</i> , both in the Court below and on appeal, that <i>B</i> was not liable.	
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Appeal to Privy Council—Leave to appeal granted without Authority—Preliminary Objection—Special Leave to appeal.] An objection that an appeal has come before the Judicial Committee without proper authority ought to be taken at the earliest moment, but may be entertained at any stage of the appeal, and is not unfrequently heard when the appeal is called on and before the arguments on the merits have commenced.

An appeal being called on, and before the case was gone into on the merits, the objection was taken by the respondent and appeared to be well-founded. The appellant thereupon applied to the Judicial Committee to grant him special leave to appeal. *nunc pro tunc*. Held, that it was competent to the Judicial Committee to grant such special leave, but leave was refused under the particular circumstances of the case.

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PRINCIPAL AND SURETY—*Promissory Note—Receipt of Interest in Advance—Giving Time to Principal—Discharge of Surety.*] In a suit against D and K on a promissory note, where K raised the defence that he was only a surety for D, and that the plaintiff having given time, D was released from liability,—held that it was necessary to show that the fact that K signed the note only as surety for D was known to the plaintiff at the time when the note was made. Held also, that a binding contract to give time to the principal cannot be inferred from the mere receipt by the creditor of interest in advance on the note.

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...] The mere taking, by the holder of a promissory note, of interest in advance from the principal debtor does not operate as an agreement not to sue during the time covered by the interest, and therefore does not constitute such a giving of time to the principal as would release the surety.

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REGISTRATION—*Act XX of 1866, ss. 22, 24, 36, 49, & 88—Limitation—Act VIII of 1859, ss. 246 & 247—"District Court"—Jurisdiction of High Court, N. W. P.]* ss. 22 and 24 of Act XX of 1866 make it imperative that the instruments therein referred to shall be presented for registration within four, or at most eight, months from the date of their execution; but the Act fixes no time within which the registration must be completed.

Where the registration of an instrument has been declared by a competent Court to be invalid, the instrument, if originally presented in due time, may again be submitted for registration, although the four months provided by s. 22, Act XX of 1866, and the further period of four months allowed by s. 24, have both expired.

A registering officer who registers a deed of sale without the vendor who executed the deed having appeared before him, acts in contravention of s. 36, Act XX of 1866; but there are no words in that section which declare that the registration of a deed under such circumstances shall be null and void.

Quære.—Whether the words of that section are not merely directory to the registering officer for the benefit of the parties to the deed; and whether his acting without the appearance of the parties as provided by the Act is more than a defect of procedure within the meaning of s. 88?

In considering the effect to be given to s. 49, Act XX of 1866 that section must be read in conjunction with s. 88, and with the words of the heading of Part x, "Of the Effects of Registration and Non-registration." It is not clear that the words of s. 49, "unless it shall have been registered in accordance with the provisions of this Act," are not confined to the procedure on admitting to registration, without reference to any matters prior to registration, or to the provisions of ss. 19, 21, or 36, or other provisions of similar nature.

For the purposes of Act XX of 1866, "District Court" means "the Principal Court of original jurisdiction in a district, and includes the High Court in its ordinary original civil jurisdiction." The High Court of the North-West Provinces, which has no ordinary original civil jurisdiction, is consequently not a "District Court" to which a petition may be presented under s. 84 of the Act, and an order passed by that Court, on such a petition, directing the registration of a deed, is made without jurisdiction.

Certain lands having been attached in execution of a decree obtained by A against B, C intervened under s. 246, Act VIII of 1859, claiming their release, on the ground that before the attachment they had been conveyed to him by B under a deed of sale, and he prayed that the execution-sale might be stayed to enable

him to put in the deed after having it registered. The Court however refused to stay the sale, and the lands were sold in execution. More than a year from the date of the Court's refusal to stay the sale, C sued to establish his right to the lands. *Held* that the suit was not barred by limitation under s. 246, Act VIII of 1859, since the refusal of the Court to postpone the sale was not an order under that section, but was a mere refusal to order a postponement under s. 247.

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REGISTRATION ACT—t (XX of 1866), s. 18, cls. 1 & 2, s. 50; AND (VIII of 1871), s. 18, cls. 1 & 2, s. 50—*Priority of registered over unregistered Document—Compulsory and Optional Registration.* A registered deed of sale, of which registration was compulsory, does not take effect against a prior unregistered mortgage bond in respect of the same land, the registration of which, it being for a sum under Rs. 100, was optional.

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RELIGIOUS ENDOWMENT—*Purchase in Name of Idol—Alienation—Limitation.* The plaintiff sued as the sebit of a certain idol to recover possession of a zemindari by setting aside an alienation thereof effected by his grandmother, on the ground that it was debuttur property dedicated to the idol, and consequently inalienable. It appeared that the property in dispute was purchased by the grandfather of the plaintiff in the name of the idol, which was set up merely for his private worship in his own house without any priests to perform regularly any religious service for the public benefit of Hindus, and that the property had been dealt with all along as his own private property. *Held*, that this was a mere nominal endowment, and consequently the alienation thereof was not invalid. *Held* also, that a property purchased by a man in the name of his own idol, which no one except himself has the power or right to worship, is not the property of the idol, but the property of the person who purchased it. *Held* on the facts, that the suit was barred by limitation.

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SHIP, ARREST OF—*Deposit of security with Marshal—Application for Arrest of deposit in another Action.*] The ship *M* having been arrested in an actions promoted by the master of the ship, *N*, for damage caused by a collision, in which the *N*, with her cargo, was totally lost, deposited with the Marshal of the Court certain Government paper as security to answer the alleged damage, on which the *M* was released. The cargo of the *N* had been insured, and on the loss thereof the Insurance Company paid the amount of the policy, and instituted proceedings against the *M* in respect of the loss of the cargo. *Held*, the Court had no power to grant an application by the Insurance Company for the arrest of the security in the hands of the Marshal, so as to make it answerable in their action.

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Act X of 1870—High Court
—Powers of Superintendence—Act X of 1870, ss. 9 & 39] The Courts established under Act X of 1870 are Courts subject to the appellate jurisdiction of the High Court, and not the less so, because an appeal lies to the High Court from their decisions in certain cases only. The High Court consequently has the power of superintendence over those Courts under s. 15 of 24 & 25 Vict., c. 104.

There is nothing in Act X of 1870 which gives the Judge and Assessors sitting together power to determine the right to compensation, or the title to the land for which compensation is to be assessed. Where therefore the Collector tendered compensation in respect of land, some of which was above, and some below, high water mark, and made an offer for each separately,—*held*, that the Judge and Assessors had no power to award the hole sum tendered by the Collector as compensation for the land above high water mark; but they should have determined what was a proper compensation for each description of land.

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----- SET ASIDE ADOPTION—*Declaratory Decree—Limitation Act (XIV of 1859), s. 1, cl. 16—Act I of 1872 (Evidence Act)—Deposition in former Suit.*] H N died on 16th May 1854 without issue, leaving a widow B. B. on 19th May 1856, purported to adopt S in accordance with an alleged anumati-patra executed by H N. R N, the uncle of H N, died on 6th July 1855, leaving a widow M, in whose favor he had executed an anumati-patra by the terms of which she was to have the management of his property during the minority of the adopted son, in whom it was to vest on his adoption. M adopted D subsequently to the adoption of S. After the death of R N, B, as widow of H N and adoptive mother of S, brought a suit against M as the widow of R N, and ignoring the existence of D. D died, and on his death M adopted N on 4th April 1864. In a suit brought on 4th January 1873 by M, as the mother and guardian of N, to have the adoption of S declared invalid,—*held*, that the limitation provided by cl. 16, s. 1, Act XIV of 1859, is applicable to a suit for a declaratory decree. The cause of action arose at the date of the adoption of S, *viz.*, the 19th May 1856, and therefore the suit was barred:

Held also, that the deposition of certain witnesses who had been examined in the previous suit to establish the fact of the adoption of S by B, were not, under s. 33, Act I of 1872, admissible in evidence against the plaintiff M in the present suit.

MRINMOYEE DABEA V. BHOORUNMYEE DABEA

----- *Limitation—Act IX of 1871, Sched. II, No. 129, s. 7—Cause of Action—Minority.*] In a suit by the reversionary heirs of one S to set aside an adoption alleged to have been made with the permission of S, the plaintiffs alleged that S died in 1844; that the adoption took place in 1845; and that they attained their majority respectively on the 26th September 1871 and the 20th December 1872.

The suit was instituted on 16th June 1873. *Held*, that the adoption having taken place after the death of S, the cause of action arose at the date of the adoption, as provided by No. 129, Sched. II, Act IX of 1871: and that the plaintiffs, not having been in existence when the cause of action arose, were not entitled to the benefit of s. 7, Act IX of 1871, so as to enable them to sue within three years of attaining their majority.

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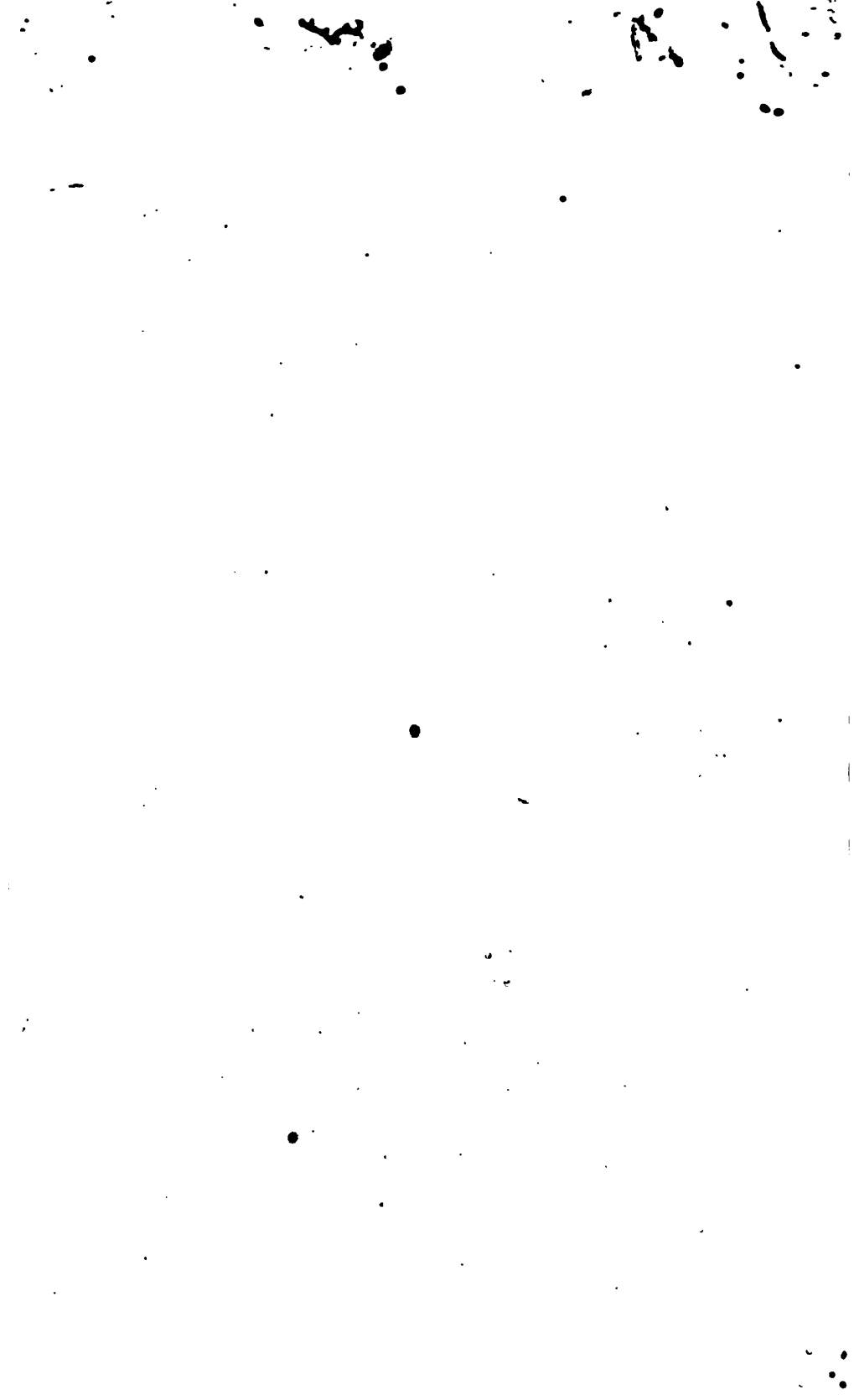
SUMMONS. SECOND. — <i>Act VIII of 1859, s. 112 Rule 12 of High Court Rules, 1st May 1875—Laches.</i>] A Judge has, under Rule 12 of the Rules of 1st May 1875, discretion as to granting a second summons, and is bound to enquire into the circumstances under which it is applied for; and when there has been great and unexplained laches, he should refuse it. Unless such discretion is clearly shown to have been improperly exercised, the Court will not interfere on appeal; but under the circumstances of this case the Court on appeal, finding there was no definite rule of partice as to the time within which a second summons might be applied for, allowed a second summons to issue.	
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VENDOR AND PURCHASER — <i>Purchase in execution of surplus Proceeds of Revenue Sale—Setting aside Revenue Sale—Suit to recover Purchase-money—Voluntary Payment.</i>] A person who, with notice, buys property subject to a contingency, which may defeat or destroy the interest which is the subject of the sale, is not entitled to be relieved from his bargain and to recover the purchase-money, merely because the contingency contemplated, actually happens, and the property either does not become, or ceases to be, available for his benefit.	
An estate of which R was one of the registered shareholders was sold for arrears of revenue, and the amount realized, after deducting the arrears and the expenses of the sale, remained in deposit with the Collector. S the holder of a decree against R, notwithstanding objections made by R, caused the interest of R in the surplus proceeds in the hands of the Collector to be attached and sold in execution of his decree. At the execution-sale R's interest was bought by B. and from the money paid by him the judgment debt of S and the debts of other judgment-creditors of R, were satisfied. In the meanwhile R brought a suit to set aside the revenue sale of the estate, and obtained a decree in his favor in the High Court. B then applied to the Collector for R's share of the surplus proceeds, but his application was refused. In a suit by B against R to recover the price he had paid at the execution-sale:	
<i>Held</i> , reversing the judgment of the High Court that such a suit could not be maintained.	
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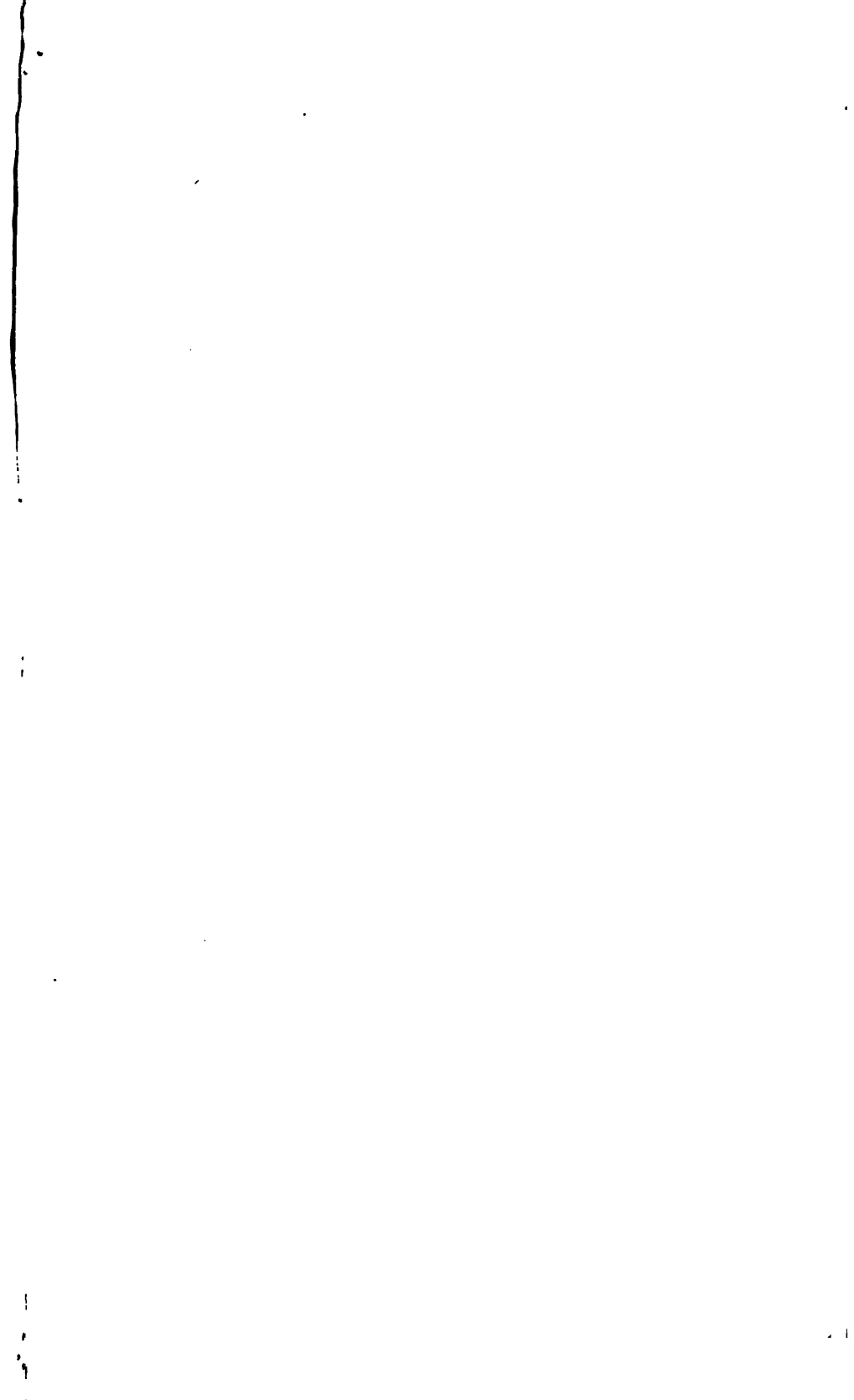
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WAKF—Mahomedan Law—Shiah Sect—Public and private Endowments—Act XX of 1863. ss. 4, 7, & 18—Reg. XIX of 1810—Jurisdiction of Civil Court—Court Fees Act (VII of 1870), Suched II, Art. 17, cl. 3—Stamp—Suit to remove Mutwali—Consequential relief—Pardnashin —Onus Probandi] *A*, a Mahomedan lady, executed a wakfnama purporting to dedicate the whole of her property to an imambara in her house, for the purpose of perpetuating various Shiah ceremonies. By the wakfnama she constituted herself joint-mutwalli with one *B*, and caused the names of herself and *B* as mutwallis to be substituted in the Collector's register for her own name as owner. On the death of *B*, *A* acted as the sole mutwalli. The wakfnama was publicly registered. But though the property was styled wakf, and *A* the mutwalli thereof, in all documents connected with the estate, *A* all along continued to deal with it as absolute proprietress, and the dedication, though made in 1852, was never under the control of the Board of Revenue or of local agents. In a suit which the plaintiffs obtained leave to institute under s. 18 of Act XX of 1863 to remove *A* from the mutwalliship on the ground of misfeasance, *held*, the wakfnama did not constitute a public religious establishment within the meaning of Act XX of 1863, and that therefore the Judge below had no authority to give the plaintiffs under s. 18 leave to sue, and that his decision was consequently *ultra vires*. S. 18 of Act XX of 1863 applies only to such religious establishments as were under the control or superintendence of the Board of Revenue or of local agents under Regulation XIX of 1810, and were transferred to trustees or managers under s. 4 of the Act. *Held* also, that where the defendant, who was shown to be an illiterate pardanashin lady, denied on her oath that in executing the wakfnama she had any intention of creating an absolute wakf, or that she understood the effect of the deed when she executed it, the onus was on the plaintiffs to show that she was fully aware of the character of the document and its legal effect, and that she had proper professional advice at the time of its execution. In the absence of such proof, *held* that the deed was not binding on her.

Where the plaintiffs sued for a declaration that a mutwali had been guilty of misfeasance, and asked to have her removed from the mutwalliship and themselves appointed in her place whereby they would have been entitled to a share in the profits of the wakf, *held* that the fixed stamp fee of Rs. 10 required by cl. 3, Act. 17, Sched. II of Act VII of 1870, was not sufficient; but the plaint should bear a stamp of a value proportionate to the subject-matter of the suit.

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